89-1350

No. _____

In The

Supreme Court of the United States

October Term, 1989

MANUEL T. FRAGANTE,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERIC K. YAMAMOTO
c/o NA LOIO NO NA KANAKA
THE LAWYERS FOR THE PEOPLE
OF HAWAII
810 North Vineyard Blvd.
Honolulu, Hawaii 96817
(808) 847-8828 or 948-6548
Counsel of Record

WILLIAM D. HOSHIJO
NA LOIO NO NA KANAKA
THE LAWYERS FOR THE PEOPLE
OF HAWAII
810 North Vineyard Blvd.
Honolulu, Hawaii 96817
(808) 847-8828
Attorney for Petitioner

110pp

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of national origin. Under the EEOC Guidelines, accent is a characteristic of national origin, and thus employees with foreign accents are protected by Title VII.

The question presented is:

Whether an employer can give hiring preference, as between qualified applicants, to non-accented speakers, solely on the basis of accent?

PARTIES TO THE PROCEEDINGS

In addition to the respondent listed in the caption, defendants in the district court and respondents in this Court are: Eileen Anderson; Peter Leong; Dennis Kamimura; George Kuwahara; and Kalani McCandless.

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Petitioner Manuel T. Fragante respectfully prays that a writ of certiorari issue to review the judgment and amended opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals opinion No. 87-2921, 699 F.2d 1429, and amended opinion, 888 F.2d 591, are attached in the appendix.

SUPREME COURT JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on March 6, 1989. Petitioner timely petitioned for rehearing en banc. On October 23, 1989, the Court of Appeals amended its opinion, and rejected the suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). An application for extension of time to file petition for a writ of certiorari has been granted, up to and including February 20, 1990.

STATUTORY PROVISIONS INVOLVED

42 U.S.C § 2000e-2(a) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

STATEMENT OF THE CASE

This case is about a local government's discriminatory refusal to hire a well-qualified permanent resident alien. Manuel Fragante was rejected for employment as a desk clerk, although concededly otherwise the best qualified applicant, solely on account of his foreign accent.

Suit was filed in 1983. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343(4) (civil rights jurisdiction).

The Plaintiff

Manuel Fragante is a 66 year old Filipino-American. He immigrated to the United States in 1981, and became a

naturalized United States citizen in 1983. His education in the Philippines, including elementary school, high school, college and law school, was conducted entirely in English.

Subsequent to retirement from the military in 1971, Mr. Fragante was privately employed in the Philippines for ten years as a distribution center manager. Throughout his military and civilian careers, which included several visits to the United States, Mr. Fragante conducted business primarily in English.

The Position

In November 1981, Mr. Fragante applied for the lowest entry level clerk position (SR-8) with the Defendant City and County of Honolulu's Department of Motor Vehicles.[1] Mr. Fragante scored the highest of the 721 applicants taking the required civil service exam.

The written examination was developed specifically for the Clerk SR-8 position by a City personnel management specialist, to measure an applicant's ability to perform routine tasks encountered by Motor Vehicle clerks, including filing, alphabetizing, arithmetic computations, and public contact. High scores on the exam correlate

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[1] The position announcement listed the clerk's duties:

> Performs a variety of clerical work in preparing, processing, and filing forms, records and similar materials in accordance with general instructions and procedures; types short notes and performs other related duties as required.

well with superior job performance. Of the fifteen applicants later certified as qualified for the two available positions, Mr. Fragante was ranked first.

Interview and Selection Process

Mr. Fragante was then interviewed by the Department's assistant licensing administrator and a secretary. Neither had any training or expertise in the area of personnel. The interview lasted approximately 10-15 minutes. There were no written questions, instructions or guidelines for the interview. The only test evaluation expert at trial, an industrial psychologist, testified that the screening process used to reject Mr. Fragante was "totally inadequate" and the worst he had encountered in 35 years. He also observed that the lack of criteria made the interview and selection process "a matter of chance."

Denial of Employment Because of Accent

After interviews of five applicants, two other applicants were re-ranked ahead of Mr. Fragante and recommended for the two available positions. Mr. Fragante was dropped from rank 1 to rank 3. He was still deemed qualified for the position. The interviewers gave no consideration to written examination results. The primary interviewer indicated in his notes that but for Mr. Fragante's accent he would have been hired:

> Speaks with very pronounced accent which is difficult to understand. He has 37 years of experience in management administration and appears more qualified for professional rather than clerical work. However, because of his

> accent, I would not recommend him for this position.

The interviewer later attempted to justify the refusal on the basis of Mr. Fragante's asserted inferior "verbal communication ability." At trial however, he recalled that "verbal communication ability" was "a fancy word for having an accent."

The only linguistic expert at trial, specializing in interactions between English and Filipino speakers, testified that Mr. Fragante spoke grammatically correct English with a Filipino accent, and that he communicated effectively in English. He found the interviewers' procedure "from a sociolinguistic point of view . . . very shabby". The expert testified that some people are prejudiced against Filipino accents and will turn-off or refuse to listen to people who speak with a Filipino accent. Listener preference for familiar accents and rejection of unfamiliar accents or manners of speech associated with a particular group is common.

At trial, the district court found that "Fragante, in fact, has a difficult manner of pronunciation" but that he possessed "extensive verbal communication skill."[2] (App. 42).

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[2] In 1983, Mr. Fragante accepted employment as a statistics clerk at the State of Hawaii Department of Labor. His responsibilities have included conducting surveys and gathering data. Mr. Fragante's job performance, including extensive oral communication with the public, has not been impeded by his accent. He has continued employment at the Department of Labor, and has been promoted.

Despite this latter finding, which was contrary to the interviewers proffered basis for their refusal to hire, the district court accepted the defendants' argument that Mr. Fragante's accent constituted a skill deficiency sufficient to justify a refusal to hire.

The Ninth Circuit affirmed the lower court's judgment. Without serious discussion, despite extensive briefing and argument below, the court summarily dismissed Mr. Fragante's argument that the defendants' negative evaluation was a result of listener bias. The court in effect held that an employer can deny employment to a qualified applicant simply by citing the applicant's foreign accent and asserting "the candidate's inability to measure up to the communications skills demanded by the job." (App. 12).

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S OPINION ENABLES EMPLOYERS TO CITE THE "EFFECT" OF FOREIGN ACCENT AS A PRETEXT FOR DENYING EMPLOYMENT ON THE BASIS OF NATIONAL ORIGIN, THEREBY EVISCERATING TITLE VII PROTECTIONS

A. ACCENT IS A CHARACTERISTIC OF NATIONAL ORIGIN AND IS THEREFORE PROTECTED UNDER TITLE VII.

Title VII of the 1964 Civil Rights Act prohibits discrimination by an employer on the basis of national origin. 42 U.S.C. 2000e-2(a). (App. 45). Several courts have recognized that accent may be so closely related to national origin as to constitute a basis for suit under Title

VII. *Carino v. University of Oklahoma*, 25 FEP Cases 1332 (W.D. Okla. 1981), *aff'd*, 750 F.2d 816 (10th Cir. 1984); *Berke v. Ohio Dept. of Public Welfare*, 30 FEP Cases 387 (S.D. Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) In addition, the Equal Employment Opportunity Commission (EEOC) Guidelines define national origin discrimination to include "the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. Section 1606.1. (App. 46). In its amicus brief in the instant case, the EEOC clearly stated its position that "it is national origin discrimination under Title VII for an employer to reject a job applicant because his foreign accent triggers a bias in the listener that impedes communication." (See App. 82).

B. THE LEGAL STANDARD SET FORTH IN THE NINTH CIRCUIT'S OPINION ENCOURAGES DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN, ALLOWING AN EMPLOYER TO DENY EMPLOYMENT TO A CONCEDEDLY QUALIFIED APPLICANT BASED SOLELY UPON THE EMPLOYER'S PERCEPTION THAT THE MAINSTREAM PUBLIC WILL PREFER NON-ACCENTED SPEECH.

In *Wards Cove Packing v. Atonio*, 109 S.Ct. 2115 (1989), this Court directed Title VII plaintiffs to focus on "a specific or particular employment practice" that has closed the door of employment opportunity. The instant case squarely addresses the as yet unsettled legal standard for evaluating challenges by members of protected

national origin groups to the specific practice of accent-based refusals to hire.

The Court of Appeals' opinion initially draws a useful distinction. It distinguishes job denials based on an applicant's "accent," which the court acknowledges are impermissible, from denials based upon the adverse "effect of accent" on communication, which the court says are permissible. The court then finds that Mr. Fragante's case falls within the latter category. (App. 18).

The peril of the Court of Appeals' opinion lies in its standard for determining when the "effect of accent" on communication justifies job denials. As discussed below, the standard applied ostensibly to determine whether employers have presented "legitimate reasons for plaintiff's non-selection," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), is extraordinarily expansive. It allows employers to assert the "effect of accent" on communication as a cover for rejecting competent foreign accented speakers. An employer is free to chose even a less qualified mainstream applicant if the competing applicant's "foreign accent triggers a bias in the listener that impedes communication." See EEOC brief. (App. 82-86).

In the instant case, no one questioned Mr. Fragante's ability to read, write or understand English. No one ever asserted that he had any difficulty with grammar, diction, vocabulary or word choice, or that he had any speech pathology. Mr. Fragante is an articulate, educated person who speaks English with a strong Filipino accent. Neither the defendants nor the courts below found him unqualified for the clerk's position because of his accent. This

case thus presents a significant and unresolved question of law. Should the legal standard in Title VII accent cases such as this exculpate employers who reject applicants with considerable English language skills because their "foreign accent triggers a bias in the listener."

The cases cited by both *amici* below, the EEOC and the Mexican American Legal Defense and Education Fund, and by the Court of Appeals, hold in essence that denial of employment on grounds if the effect of accent on communication is justified only where accent interferes with job performance. *Carino v. University of Oklahoma*, 25 FEP Cases 1332 (W.D. Okla. 1981), aff'd 750 F.2d 815 (10th Cir. 1984) (plaintiff's accent did not prevent him from performing supervisory tasks in dental laboratory); *Berke v. Ohio Department of Public Welfare*, 30 FEP Cases 387 (S.D. Ohio 1978), aff'd 628 F.2d 980 (6th Cir. 1980) (pronounced accent did not substantially impede job performance); *Tran v. City of Houston*, 35 FEP Cases 471 (S.D. Texas 1984) (after careful evaluation, plaintiff denied promotion to engineer inspector, where high level communication of legal and engineering concepts required); *Hou v. Commonwealth of Pennsylvania*, 573 F.Supp. 1539 (W.D. Pennsylvania 1983) (after lengthy on the job evaluation, tenured professor denied promotion in light of difficulty communicating high level concepts). These cases, however, have not clearly defined standards in determining when accents unacceptably interfere with job reference. They also have not determined whether listener bias against accented speech is a legitimate ground for finding the accented speaker incapable of communicating.

In this case, the legal standard applied by the Court of Appeals did not require a showing at trial, and the

district court did not find, that Mr. Fragante's accent impeded the kind of communication required by the clerk position. The position is a low-level clerical one encompassing tasks such as filing and cashiering. Although some public contact is a part of the job, it is contact over routinized matters such as the cost of registering a motor vehicle. The district court found that Mr. Fragante "has a difficult manner of pronunciation" (App. 42) and concluded that his "oral communication skills were hampered by his accent." (App. 43). The district court, however, did not find Fragante incapable of communicating acceptably according to job requirements.

Most significant, the district court substantiated indirectly the crux of Fragante's claim, finding first that "plaintiff has extensive verbal communication skill in English," and then explaining his "communication problem" in terms of listener bias – "listeners stop listening to Filipino accents, resulting in a breakdown of communication." (App. 42). In the Court of Appeals, Fragante argued that such reliance on listener prejudice, like biased customer preferences, is not a legitimate reason for finding an inability to communicate. The Court of Appeals acknowledged the issue, but dismissed it without serious discussion. (App. 16).

The district court also determined and the Court of Appeals acknowledged that the interview procedures lacked formality as to standards, instructions, guidelines or criteria for conduct, and that the interview rating sheet was inadequate. (App. 39). The only expert industrial psychologist at trial described the city's screening process as the worst he had seen in 35 years in the field.

In sum, the Court of Appeals accepted the employer's contention of "effect of accent" on communication as a legitimate business reason for non-hiring. It did so without requiring a showing of job performance disability, without acknowledging the inappropriateness of allowing listener bias to determine a speaker's "ability" to communicate, and without requiring minimally adequate interview procedures. The Court of Appeals thus adopted a legal standard that strikes at the heart of Title VII protections against accent discrimination. The court recognized the danger posed,[3] but failed, by its words and its analysis, to require the district court to undertake the "very searching look" it deemed essential.

C. THE NINTH CIRCUIT'S DECISION ERECTS A BARRIER TO SOCIO-ECONOMIC ADVANCEMENT FOR THOSE WITH FOREIGN ACCENTS.

As a nation of immigrants, we are a nation of accents. As the Court of Appeals noted, throughout American

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[3] The Court of Appeals cautioned trial courts on the danger of pretextual claims proffered under its analysis:

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching look at such a claim. (App. 12).

history immigrants, with their languages and accents, have been drawn to this country by the promises of freedom, equality, and economic opportunity, and have contributed greatly to the strength of the nation. (App. 10). The court recognized the irony and injustice of denying economic opportunity to these very immigrants on the basis of their national origin. (App. 11). Yet that will be the likely result of the Court of Appeals' decision.

As briefed below by amicus Mexican American Legal Defense and Education Fund, discrimination on the basis of accent affects large numbers of United States citizens and permanent residents, particularly those who attend segregated or inferior schools and those immigrants who have learned to speak English as adults. If not redressed, this type of discrimination will continue to affect large numbers of workers who speak with accents not recognized as mainstream "American." (App. 54-58).

This particular case involves a job applicant with a Filipino accent. Filipinos constitute over 14% of the population of the State of Hawaii, making them the third largest ethnic group in Hawaii. Immigrants from the Philippines now make up more than half of the total yearly immigration to Hawaii, and more than half of the Filipinos in Hawaii are Philippine-born. Hawaii Filipinos are of lower socio-economic status than Hawaii non-Filipinos by almost every indicia: education; employment (they are underrepresented in management, professional, and technical positions and overrepresented in service and laborer positions); and income.[4]

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[4] *Filipino Immigrants in Hawaii: A Profile of Recent Arrivals*, The East-West Population Institute, Honolulu, Hawaii, 1985. A

(Continued on following page)

Discrimination against speakers with Filipino accents is not uncommon in Hawaii. Pretextual justification of national origin accent discrimination raises a barrier to socio-economic advancement for many, perpetuating national origin class barriers and precluding full participation in American life. As employers grow more sophisticated fewer may openly discriminate. But in accord with the Court of Appeals' analysis many more will be empowered to legally discriminate on the basis of accent simply by citing the "effect of accent" on communication.

As noted by the linguistic expert at trial, all speakers have accents. In recent years the number of reported national origin accent cases has increased significantly. The cases involve a wide range of accents and job positions. *See Carino v. University of Oklahoma*, 25 FEP Cases 1332 (W.D. Okla. 1981), *aff'd* 750 F.2d 816 (10th Cir. 1984) (university discriminated against employee by demoting him from position of dental laboratory supervisor because of Filipino accent); *Berke v. Ohio Dept. of Public Welfare*, 30 FEP Cases 387 (S.D. Ohio 1978), aff'd 628 F.2d 980 (6th Cir. 1980) (refusal to hire on the basis of pronounced Polish accent constituted unlawful discrimination); *Bell v. Home Life Insurance Co.*, 596 F.Supp. 1549 (M.D.N.C. 1984) (charge of discrimination on basis of New Zealand accent unfounded where termination of employment was based on valid business reason unrelated to accent); *Loiseau v. Dept. of Human Resources*, 567 F.Supp. 1211 (D. Or. 1983) (claim that employee's inability

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court may take judicial notice of this statistical information pursuant to Fed.R.Evid. 201(b)(2).

to communicate was basis for decision not to promote was pretext for discrimination against employee who was black and spoke with a West Indian accent); *Mandhare v. LaFargue Elementary School*, 605 F.Supp. 238 (E.D. La. 1985) (denial of reappointment to librarian position on the basis that Indian accent affected job performance was unlawful discrimination where librarian was found eminently qualified).

This Court has never addressed the appropriate legal standard for accent discrimination cases. The linguistic reality is that accent is a function of both speech and listener perception. The historical reality is that prejudice against the foreign born is intertwined with prejudice against foreign accents. Trial courts need guidance in deciding the growing number of accent discrimination complaints. Without clarification or reformulation of the legal standard adopted by the Court of Appeals the problems of national origin accent discrimination will continue.

SUMMARY

Some employers refuse to hire English-speaking job applicants because employers are discomforted by the applicants' foreign accents. They sound different. A listener must actively listen. This is a significant problem of personal livelihood for increasing numbers of permanent resident aliens and naturalized citizens. They learn English as a second language well enough to communicate with English-only speakers, but are denied jobs for which they are qualified because, to employers, they do

not sound like mainstream speakers. The stakes are high for the immigrants. Challenges are difficult. Employers control most relevant information.

The Ninth Circuit's *Fragante* opinion exacerbates the problem and in significant respects emasculates Title VII national origin protections for immigrants. To deny employment to an otherwise qualified applicant, an employer only need determine that the applicant speaks with an accent that the employer prefers not to hear and conclude that the applicant is therefore "difficult" to understand. Almost every person speaking English with an accent can be said to be "difficult" to understand at first listen. Some job applicants may speak in such a manner as to render them incapable of communicating at the level required for the job. They are unqualified and need not be hired. Others, such as Manuel Fragante, may have considerable fluency with the English language, speaking it coherently and grammatically with an accent. While a mainstream listener might at first say those applicants are difficult to understand, those applicants can communicate at the level required for the job. They can perform. Refusals to hire due to their accent reflect discrimination on the basis of national origin.

The Court of Appeals' opinion draws no meaningful dividing line between permissible and impermissible refusals to hire, in effect empowering employers to use accent as a "legitimate" business reason for denying employment solely on the basis of listener bias.

CONCLUSION

For these reasons, Petitioner Manuel Fragante respectfully requests the issuance of a writ of certiorari.

ERIC K. YAMAMOTO
c/o NA LOIO NO NA KANAKA
The Lawyers for the People
of Hawaii
810 North Vineyard Blvd.
Honolulu, Hawaii 96817
(808) 847-8828 or 948-6548
Counsel of Record

WILLIAM D. HOSHIJO
NA LOIO NO NA KANAKA
The Lawyers for the People
of Hawaii
810 N. Vineyard Blvd.
Honolulu, Hawaii 96817
(808) 847-8828
Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL T. FRAGANTE, *Plaintiff-Appellant*, v. CITY and COUNTY OF HONOLULU; EILEEN ANDERSON; PETER LEONG; DENNIS KAMIMURA; GEORGE KUWAHARA; KALANI McCANDLESS, *Defendants-Appellees*.	No. 87-2921 D.C. No. CV-83-1129-PGR AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
November 17, 1988 – Honolulu, Hawaii

Filed March 6, 1989
Amended October 23, 1989

Before: Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges, and Alan C. Kay*, District Judge.

Opinion by Judge Trott

*Honorable Alan C. Kay, United States District Judge, District of Hawaii, sitting by designation.

SUMMARY

Employment Discrimination/Civil Service

Affirming the district court's dismissal of complaint, the court held that a municipality's refusal to employ a Filipino because of his heavy accent was not a pretext to discrimination based on the applicant's national origin.

Appellant Manuel T. Fragante filed a Title VII claim against the City and County of Honolulu. Fragante had applied and tested for an entry level Civil Service Clerk job for the City of Honolulu's Division of Motor Vehicles and Licensing, which Fragante knew included duties at the information counter and over the telephone. Although he had the highest score of all the applicants, two oral interviewers agreed that Fragante was difficult to understand and selected two other applicants for the job openings. Fragante alleged in his suit that he was discriminated against because of his accent under the Civil Rights Act's "disparate treatment" theory. The district court found no evidence of unlawful discrimination, concluding that Fragante lacked the bona fide occupational requirement of being able to communicate effectively with the public. The district court dismissed the complaint. On appeal, Fragante contended he had established a prima facie case and the City failed to rebut the presumption of discrimination.

[1]Fragante did not carry the ultimate burden of proving national origin discrimination and the issue of whether Fragante established a prima facie case of discrimination was not significant. [2] There were two conflicting considerations: 1) unlawful discrimination based

on national origin not permitted to exist in the workplace, and 2) the preservation of an employer's freedom of choice. [3] Although the City articulated a legitimate, nondiscriminatory reason for Fragante's nonselection, the court added a note of caution to avoid abuse by employers. [4] An employer may make an adverse employment decision based on an honest assessment of the oral communications skills of an applicant when such skills are reasonably related to job performance. [5] The evidentiary record supported the finding that oral ability to communicate effectively in English was reasonably related to the normal operation of the clerk's office. [6] Fragante could not point to facts that indicated his application ranking was based on factors other than his inability to communicate effectively with the public. [7] No pretextual discriminatory motive could be found and [8] without proof of such pretext, the district court's finding of no discrimination was not clearly erroneous.

COUNSEL

William D. Hushijo and Mari J. Matsuda, Honolulu, Hawaii for the plaintiff/appellant.

Gilbert C. Doles, Deputy Corporate Counsel, City & County of Honolulu, Hawaii, for the defendants/appellees.

Susan Buckingham Reilly, Assistant General Counsel, Equal Opportunity Commission, Washington, D.C., and Jose Roberto Juarez, Jr., Mexican American Legal Defense and Educational Fund, for the amici.

OPINION

TROTT, Circuit Judge:

Manuel Fragante applied for a clerk's job with the City and County of Honolulu (Defendants). Although he placed high enough on a civil service eligible list to be chosen for the position, he was not selected because of a perceived deficiency in relevant oral communication skills caused by his "heavy Filipino accent." Fragante brought suit, alleging that the defendants discriminated against him on the basis of his national origin, in violation of Title VII of the Civil Rights Act. At the conclusion of a trial, the district court found that the oral ability to communicate effectively and clearly was a legitimate occupational qualification for the job in question. This finding was based on the court's understanding that an important aspect of defendant's business – for which a clerk would be responsible – involved the providing of services and assistance to the general public. The court also found that defendant's failure to hire Fragante was explained by his deficiencies in the area of oral communication, not because of his national origin. Finding no proof of a discriminatory intent or motive by the defendant, the court dismissed Fragante's complaint, and he appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

FACTS

In April 1981, at the age of sixty, Fragante emigrated from the Philippines to Hawaii. In response to a newspaper ad, he applied in November of 1981 for the job at

issue in this appeal – an entry level Civil Service Clerk SR-8 job for the City of Honolulu's Division of Motor Vehicles and Licensing. The SR-8 clerk position involved such tasks as filing, processing mail, cashiering, orally providing routine information to the "sometimes contentious" public over the telephone and at an information counter, and obtaining supplies. Fragante scored the highest of 721 test takers on the written SR-8 Civil Service Examination which tested, among other things, word usage, grammar and spelling. Accordingly, he was ranked first on a certified list of eligibles for two SR-8 clerk positions, an achievement of which he is understandably quite proud.

Fragante then was interviewed in the normal course of the selection process – as were other applicants – by George Kuwahara, the assistant licensing administrator, and Kalani McCandless, the division secretary. Both Kuwahara and McCandless were personally familiar with the demands of the position at issue, and both had extensive experience interviewing applicants to the division. During the interview, Kuwahara stressed that the position involved constant public contact and that the ability to speak clearly was one of the most important skills required for the position.

Both Kuwahara and McCandless had difficulty understanding Fragante due to his pronounced Filipino accent, and they determined on the basis of the oral interview that he would be difficult to understand both at the information counter and over the telephone. Accordingly, both interviewers gave Fragante a negative recommendation. They noted he had a very pronounced

accent and was difficult to understand. It was their judgment that this would interfere with his performance of certain aspects of the job. As a consequence, Mr. Fragante dropped from number one to number three on the list of eligibles for the position.

Under the city's civil service rules, the Department of Motor Vehicles and Licensing, as the appointing authority, is allowed discretion in selecting applicants for the clerk vacancies. City Civil Service Rule 4.2(d) allows the defendants to select any of the top five eligibles without regard to their rank order.[1] The essence of this rule was clearly stated in the employment announcement posted for the SR-8 position:

> The names of the "top five" qualified applicants with the highest examination grades will be referred to the employing agency in the order of their examination grade and availability for employment according to Civil Service Rules. The employing agency may select any one of the eligibles referred. Those not selected will remain on the list for at least one year for future referrals.

In accord with this process, the two other applicants who were judged more qualified than Fragante and who therefore placed higher than he on the final list got the two available jobs, and he was so notified by mail.

After exhausting administrative remedies, Fragante filed a claim under Title VII of the Civil Rights Act

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[1] Obviously the "rule of five" does not confer upon defendant a license to discriminate unlawfully against an applicant. We note that the validity of the "rule of five" per se was not challenged by Fragante and is not an issue on this appeal.

against the City and County of Honolulu, alleging he was discriminated against because of his accent. The district court relied on the results of the oral interview and found that Fragante's oral skills were "hampered by his accent or manner of speaking." The court found no evidence of unlawful discrimination in violation of Title VII, concluding that Fragante lacked the "bona fide occupational requirement"[2] of being able to communicate effectively with the public, and dismissed his claim.

II
DISCUSSION

The ultimate question of discrimination is generally considered a finding of fact subject on review to the clearly erroneous standard. *United States Postal Service v. Aiken*, 460 U.S. 711, 715-16 (1983); *Alarriz v. California Processors, Inc.*, 785 F.2d 1412, 1416 (9th Cir. 1986). However, such findings based on an erroneous application of law are reviewable as questions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Alarriz*, 785 F.2d at 1416.

Title VII prohibits employment discrimination on the basis of race, color, sex, religion and national origin. 42 U.S.C. § 2000e-2(a)(1)(1982). A plaintiff may bring an action against an employer under a disparate treatment and/or disparate impact theory. Fragante's action was brought under the disparate treatment theory.

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[2] Although the district judge used the language of 42 U.S.C. § 2000e-2(e)(1), it is clear from the record that he did so only to describe the legitimacy of the defendant's reason for the adverse action, not to invoke the statute itself.

In disparate treatment cases, the employer is normally alleged to have "treat[ed] a person less favorably than others because of the person's race, color, religion, sex, or national origin. . . ." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The plaintiff has the initial burden in such a case of proving by a preponderance of the evidence a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

To establish a prima facie case of disparate treatment, the plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." *Yartzoff v. Thomas*, 809 F.2d 1371, 1374 (9th Cir. 1987)(quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Plaintiffs commonly prove a prima facie case by showing that the four factors set forth in *McDonnell Douglas* are present. To accomplish this, a plaintiff such as Fragante must show: (1) that he has an identifiable national origin; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* "Title VII's nature and purpose require that the *McDonnell Douglas* test be flexible." *Spaulding v. University of Washington*, 740 F.2d 686, 700 (9th Cir.), *cert. denied* 469 U.S. 1036 (1984). The burden of establishing a prima facie case for disparate treatment is not onerous. *Burdine*, 450 U.S. at 253. A determination of whether a plaintiff establishes a prima facie case will depend on the facts of each case. *Id.*

Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by "articulating some legitimate, nondiscriminatory reason" for the adverse action. *Id.* at 254. After the employer presents legitimate reasons for plaintiff's non-selection, the burden shifts to the plaintiff, and he must show – if he can – that the employer's purported reason for non-selection was "a pretext for invidious discrimination". *Id.* at 252-53. To succeed in carrying the ultimate burden of proving intentional discrimination, a plaintiff may establish a pretext either directly, by showing that the employer was more likely motivated by a discriminatory reason, or indirectly, by showing the employer's proffered reason is unworthy of credence. *Id.* at 256.

A. Prima Facie Case

Defendants first argue Fragante failed to meet his burden of proving a prima facie case because he failed to show he was actually qualified for the SR-8 clerk position, a position which requires the applicant to be able to communicate clearly and effectively. Fragante, on the other hand, contends he was qualified for the position. As proof he points to his exceptional score on the objective written examination, and he argues that his speech, through heavily accented, was deemed comprehensible by two expert witnesses at trial. Fragante's position is supported by the approach taken by the Equal Employment Opportunity Commission which submits that a plaintiff who proves he has been discriminated against solely because of his accent does establish a prima facie case of national origin discrimination. *Bell v. Home Life*

Insurance Co., 596 F.Supp. 1549, 1554-55 (M.D.N.C. 1984); *Carino v. University of Oklahoma*, 25 FEP Cases 1332, 1336-37 (W.D. Okla. 1981), *aff'd*, 750 F.2d 816 (10th Cir. 1984). *See also Berke v. Ohio Dept. of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980)(per curiam)(court upheld determination that discrimination on the basis of foreign accent was a sufficient basis for finding national origin discrimination). This contention is further supported by EEOC guidelines which define discrimination to include "the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1988). Furthermore, Fragante was never advised that he was not qualified for the job: he was only told that he was less-qualified than his competition.

[1] Because we find that Fragante did not carry the ultimate burden of proving national origin discrimination, however, the issue of whether Fragante established a prima facie case of discrimination is not significant, and we assume without deciding that he did.

B. The Statute and its Purpose

[2] Preliminarily, we do well to remember that this country was founded and has been built in large measure by people from other lands, many of whom came here – especially after our early beginnings – with a limited knowledge of English. This flow of immigrants has continued and has been encouraged over the years. From its inception, the United States of America has been a dream to many around the world. We hold out promises of freedom, equality, and economic opportunity to many

who only know these words as concepts. It would be more than ironic if we followed up our invitation to people such as Manuel Fragante with a closed economic door based on national origin discrimination. It is no surprise that Title VII speaks to this issue and clearly articulates the policy of our nation; unlawful discrimination based on national origin shall not be permitted to exist in the workplace. But, it is also true that there is another important aspect of Title VII: the "preservation of an employer's remaining freedom of choice." *Price Waterhouse v. Ann B. Hopkins*, 109 S.Ct. 1775 (1989). In that regard, the court said:

> To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact cases, see *Watson* and *Griggs*, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives.
>
> * * *
>
> When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history.

* * *

> Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications. . . .

Id. at 1786-87.

With this guidance in mind, and particularly its focus on employment qualifications, we proceed to the task at hand.

C. Proof of an Ultimate Case of Discrimination

[3] We turn our discussion to whether defendants articulated a legitimate, nondiscriminatory reason for Fragente's nonselection. We find that they did, but to this finding we add a note of caution to the trial courts. Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching look by the district courts at such a claim.[3]

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[3] The EEOC cautions that denying employment opportunities because of an individual's foreign accent insofar as it creates an inability to communicate well in English may be a "cover" for unlawful discrimination. Thus, the EEOC appropriately provides that it will "carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin." 29 C.F.R. § 1606.6(b)(1). We, likewise, give careful consideration to Fragante's allegation of national origin discrimination.

[4] An adverse employment decision may be predicated upon an individual's accent when – but only when – it interferes materially with job performance. There is nothing improper about an employer making an *honest* assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance. EEOC Compliance Manual (CCH) ¶ 4035 at 3877-78 (1986); *see also Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978)(Dominican chambermaid properly denied promotion to front desk because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"); *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir. 1984)(plaintiff with a "noticeable" Filipino accent was improperly denied a position as supervisor of a dental laboratory where his accent did not interfere with his ability to perform supervisory tasks); *Berke*, 628 F.2d at 981 (employee with "pronounced" Polish accent whose command of English was "well above that of the average adult American" was improperly denied two positions because of her accent).

[5] The defendants advertised for applicants to fill SR-8 vacancies. The initial job announcement listed the ability to "deal tactfully and effectively with the public" as one of the areas to be tested. There is no doubt from the record that the oral ability to communicate effectively in English is reasonably related to the normal operation of the clerk's office. A clerk must be able to respond to the public's questions in a manner which the public can understand. In this regard, the district court in its Findings of Fact and Conclusions of Law and Order made the following significant observations:

> The job is a difficult one because it involves dealing with a great number of disgruntled members of the public. The clerk must deal with 200-300 people a day, many of whom are angry or complaining and who do not want to hear what the clerk may have to explain concerning their applications or an answer to their questions. It is a high turnover position where people leave quickly because of the high stress involving daily contact with contentious people.

(Clerk's Record 30 at 7).

What must next be determined is whether defendants established a factual basis for believing that Fragante would be hampered in performing this requirement. Defendants submit that because his accent made Fragante difficult to understand as determined by the interview, he would be less able to perform the job than other applicants. Fragante, on the other hand, contends he is able to communicate effectively in English as established by two expert witnesses at trial and by his responses in open court. In essence, he argues his non-selection was effectively based upon national origin discrimination.

After the interview, Kuwahara and McCandless scored Fragante on a rating sheet that was used for all applicants. Applicants were scored in the categories of appearance, speech, self-confidence, emotional control, alertness, initiative, personality, attitude, work experience, and overall fitness for the job. A scale of 1-10 was used. Kuwahara gave Fragante a score of 3 for speech, and noted: "very pronounced accent, difficult to understand." Although McCandless did not enter a score in the speech category, she noted: "Heavy Filipino accent. Would be difficult to understand over the telephone."

After the interviews were scored, Kuwahara and McCandless reviewed the scores, discussed the applicants, and decided on their hiring recommendations to finance director Peter Leong. In making the recommendation, written examination scores were given no consideration. Kuwahara prepared the written recommendation to Leong, dated April 13, 1982, recommending two others for selection. Fragante in his position as Number 3 on the final list was described as follows:

> 3. Manuel Fragante – Retired Phillippine (sic) army officer. Speaks with very pronounced accent which is difficult to understand. He has 37 years of experience in management administration and appears more qualified for professional rather than clerical work. However, because of his accent, I would not recommend him for this position.

(P. Ex. A at 9; P. Ex. N).

McCandless then notified Fragante that he was not selected for either of the clerk position vacancies. Pursuant to a request from Fragante, Kuwahara then reduced the matter to writing. In a letter, dated June 28, 1982, the reasons why he was not selected were articulated as follows:

> As to the reason for your non-selection, we felt the two selected applicants were both superior in their verbal communication ability. As we indicated in your interview, our clerks are constantly dealing with the public and the ability to speak clearly is one of the most important skills required for the position. Therefore, while we were impressed with your educational and employment history, we felt the applicants selected would be better able to work in our office because of their communication skills.

(P. Ex. A at 10; P. Ex. Q).

[6] Thus, the interviewers' record discloses Fragante's third place ranking was based on his "pronounced accent which is difficult to understand." Indeed, Fragante can point to no facts which indicate that his ranking was based on factors other than his inability to communicate effectively with the public. This view was shared by the district court.

Although the district court determined that the interview lacked some formality as to standards, instructions, guidelines, or criteria for its conduct and that the rating sheet was inadequate, the court also found that these "insufficiencies" were irrelevant with respect to plaintiff's complaint of unlawful discrimination. A review of the record reveals nothing that would impeach this assessment. Kuwahara and McCandless recorded their evaluation of Fragante's problem in separate written remarks on their rating sheets. As such, a legitimate factual basis for this conclusion that Fragante would be less able than his competition to perform the required duties was established.

Fragante argues the district court erred in considering "listener prejudice" as a legitimate, nondiscriminatory reason for failure to hire. We find, however, that the district court did not determine defendants refused to hire Fragante on the basis that some listeners would "turn off" a Filipino accent. The district court after trial noted that: "Fragante, in fact, has a difficult manner of pronunciation and the Court further finds as a fact from his general testimony that he would often not respond directly to the questions as propounded. He maintains

much of his military bearing." We regard the last sentence of the court's comment to be little more than a stray remark of no moment.

We do not find the court's conclusion clearly erroneous. We find support for our view in *Fernandez v. Wynn Oil.*, 653 F.2d 1273, 1275 (9th Cir. 1981), where this court held inability to communicate effectively to be one valid ground for finding a job applicant not qualified.

[7] Having established that defendants articulated a legitimate reason for Fragante's non-selection, our next inquiry is whether the reason was a mere pretext for discrimination. Fragante essentially argues that defendant's selection and evaluation procedures were so deficient as to render the proffered reason for non-selection nothing more than a pretext for national origin discrimination. The problem with this argument, however, is that on examination it is only a charge without substance. The process may not have been perfect, but it reveals no discriminatory motive or intent. Search as we have, we have not been able to find even a hint of a mixed motive such as existed in *Price Waterhouse*. Instead, it appears that defendants were motivated exclusively by reasonable business necessity.

Fragante's counsel attempts to cast this case as one in which his client was denied a job simply because he had a difficult accent. This materially alters what actually happened. Fragante failed to get the job because two competitors had superior qualifications with respect to a relevant task performed by a government clerk. Insofar as this implicates "the interest of the State, as an employer, in promoting the efficiency of the public services it performs

through its employees . . . ," *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), it is not something we are permitted to ignore. Title VII does not stand for the proposition that a person in protected class – or a person with a foreign accent – shall enjoy a position of advantage thereby when competing for a job against others not similarly protected. *Cf. Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 285 (1977). And, the record does not show that the jobs went to persons less qualified than Fragante: to the contrary.

[8] Under our holding in *Ward v. Westland Plastics, Inc.*, 651 F. 1266, 1269 (9th Cir. 1980), "[a]n employer's decision may be justified by the hired employee's superior qualifications unless the purported justification is a pretext for invidious discrimination." *Fernandez*, 653 F.2d at 1276. In this case, there is simply no proof whatsoever of pretext, and we do not find the district court's finding of "no discrimination" to be clearly erroneous.

In sum, the record conclusively shows that Fragante was passed over because of the deleterious *effect* of his Filipino accent on his ability to communicate orally, not merely because he had such an accent.

The district court is

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL T. FRAGANTE, Plaintiff-Appellant, v. CITY and COUNTY OF HONOLULU; EILEEN ANDERSON; PETER LEONG; DENNIS KAMIMURA; GEORGE KUWAHARA; KALANI McCANDLESS Defendants-Appellees.	No. 87-2921 D.C. No. CV-83-1129-PGR *ORDER* (Filed Oct. 23, 1989)

Before: O'SCANNLAIN and TROTT, Circuit Judges, and KAY*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing; Judges O'Scannlain and Trott have voted to reject the suggestion for rehearing en banc, and Judge Kay has recommended that it be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Alan C. Kay, United States District Judge, District of Hawaii, sitting by designation.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL T. FRAGNATE, *Plaintiff-Appellant,* v. CITY and COUNTY OF HONOLULU; EILEEN ANDERSON; PETER LEONG; DENNIS KAMIMURA; GEORGE KUWAHARA; KALANI McCANDLESS, *Defendants-Appellees.*	No. 87-2921 D.C. No. CV-83-1129-PGR OPINION

Appeal from the United States District Court
for the District of Hawaii
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
November 17, 1988 – Honolulu, Hawaii

Filed March 6, 1989

Before: Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges, and Alan C. Kay*, District Judge.

Opinion by Judge Trott

SUMMARY

Employment Discrimination/Civil Service

Affirming the district court's dismissal of a Civil Rights Act suit, the court held that the governmental

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* Honorable Alan C. Kay, United States District Judge, District of Hawaii, sitting by designation.

employer's decision not to hire an applicant was based on his lack of a bona fide occupational qualification (BFOQ).

Appellant Manuel Fragante applied for a job with the appellee City and County of Honolulu, took a written civil service examination and achieved the highest score. He was ranked first on the eligibles list. Government officials gave him negative recommendations based on their difficulty in understanding him due to his pronounced Filipino accent. He was dropped to third position on the eligibles list and another person was hired. After exhausting administrative remedies, Fragante filed a civil rights action under the disparate treatment theory, alleging discrimination because of his accent. The district court found no evidence of unlawful discrimination, that he lacked the BFOQ of effective communication with the public, and dismissed the claim.

[1] In disparate treatment cases, the employer is normally alleged to have treated a person less favorably than others for reasons of race, color, religion, sex, or national origin. The plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence. [2] The evidence for a prima facie case must give rise to an inference of unlawful discrimination. [3] Once the prima facie case is established, the employer must rebut it by articulating a legitimate, nondiscriminatory reason for the adverse action. The plaintiff must then show that the employer's purported reason for non-selection was a pretext for discrimination. [4] Fragante was not selected because of the deleterious *effect* his accent had on his ability to communicate orally, not because he had an accent. Employers may base non-selection on such a

requirement, if it is reasonably necessary to the operation of the business. [5] The ability to communicate effectively in oral English is reasonably necessary to the position appellant sought, and meets the statutory standard. [6] The selection process showed no discriminatory motive and appeared to be based exclusively on reasonable business necessity. There was no proof of pretext and the district court's finding of no discrimination is not clearly erroneous.

COUNSEL

William D. Hushijo and Mari J. Matsuda, Honolulu, Hawaii for the plaintiff/appellant.

Gilbert C. Doles, Deputy Corporate Counsel, City & County of Honolulu, Hawaii, for the defendants/appellees.

Susan Buckingham Reilly, Assistant General Counsel, Equal Opportunity Commission, Washington, D.C., and Jose Roberto Juarez, Jr., Mexican American Legal Defense and Educational Fund, for the amici.

OPINION

TROTT, Circuit Judge:

Manuel Fragante applied for a clerk's job with the City and County of Honolulu (Defendants). Although he placed high enough on a civil service eligible list to be chosen for the position, he was not selected because of a perceived deficiency in relevant oral communication skills caused by his "heavy Filipino accent." Fragante alleges defendants discriminated against him on the basis

of his national origin, in violation of Title VII of the Civil Rights Act. The district court after a trial found the ability to communicate effectively and clearly was a bona fide occupational qualification (BFOQ) for the job in question. This finding was based on the court's understanding that an important aspect of defendant's business for which a clerk would be responsible involved the providing of services and assistance to the general public. The court found that defendant's failure to hire Fragante was explained by his deficiencies in the area of oral communication, not because of his national origin. Fragante appeals the court's dismissal of his complaint. We have jurisdiction under 28 U.S.C. § 1291, and we affirm

I

FACTS

In April 1981, at the age of sixty, Fragante emigrated from the Philippines to Hawaii. In response to a newspaper ad, Fragante applied in November of 1981 for the job at issue in this appeal – an entry level Civil Service Clerk SR-8 job for the City of Honolulu's Division of Motor Vehicles and Licensing. The SR-8 clerk position involved such tasks as filing, processing mail, cashiering, orally providing routine information to the "sometimes contentious" public over the telephone and at an information counter, and obtaining supplies. Fragante scored the highest of 721 test takers on the written SR-8 Civil Service Examination which tested, among other things, word usage, grammar and spelling. Accordingly, he was ranked first on a certified list of eligibles for two SR-8 clerk positions.

Fragante then was interviewed in the normal course of the selection process by George Kuwahara, the assistant licensing administrator, and Kalani McCandless, the division secretary. Both Kuwahara and McCandless were personally familiar with the demands of the position at issue, and both had extensive experience interviewing applicants to the division. During the interview, Kuwahara stressed that the position involved constant public contact and that the ability to speak clearly was one of the most important skills required for the position. Both Kuwahara and McCandless had difficulty understanding Fragante due to his pronounced Filipino accent, and they therefore determined on the basis of the oral interview that he would be difficult to understand over both the information counter and telephone. After this 10-15 minute interview, both interviewers gave Fragante a negative recommendation. They noted he had a very pronounced accent and was difficult to understand, and it was their judgment that this would interfere with his performance of certain aspects of the job. As a consequence, Mr. Fragante dropped from number one to number three on the list of eligibles for the position.

Under the city's civil service rules, the Department of Motor Vehicles and Licensing, as the appointing authority, is allowed discretion in selecting applicants for the clerk vacancies. The employment announcement posted for the SR-8 position concerning the eligible list and referral stated:

> The names of the "top five" qualified applicants with the highest examination grades will be referred to the employing agency in the order of their examination grade and availability for employment according to Civil Service Rules.

> The employing agency may select any one of the eligibles referred. Those not selected will remain on the list for at least one year for future referrals.

City Civil Service Rule 4.2(d) allows defendants to select any of the top five eligibles, without regard to the rank order.[1] The interviewers determined in accord with this process that there were two other applicants who were more qualified than Fragante. Accordingly, Fragante was notified by mail that two applicants, who were superior in their verbal communication ability, were selected.

After exhausting administrative remedies, Fragante filed a claim under Title VII of the Civil Rights Act against the City and County of Honolulu, alleging he was discriminated against because of his accent. The district court relied on the results of the oral interview and found that Fragante's oral skills were "hampered by his accent or manner of speaking." The court found no evidence of unlawful discrimination in violation of Title VII and concluded that Fragante lacked the "bona fide occupational requirement" of being able to communicate effectively with the public and dismissed his claim. Fragante appeals.

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[1] Obviously the "rule of five" does not confer upon defendant a license to discriminate unlawfully against an applicant. We also note that the validity of the "rule of five" per se was not challanged by Fragante and is not an issue on this appeal.

II

DISCUSSION

The ultimate question of discrimination is generally considered a finding of fact subject on review to the clearly erroneous standard. *United States Postal Service v. Aiken*, 460 U.S. 711, 715-16 (1983); *Alarriz v. California Processors, Inc.*, 785 F.2d 1412, 1416 (9th Cir. 1986). However, such findings based on an erroneous application of law are reviewable as questions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Alarriz*, 785 F.2d at 1416.

Title VII prohibits employment discrimination on the basis of race, color, sex, religion and national origin. 42 U.S.C. § 2000e-2(a)(1)(1982). A plaintiff may bring an action against an employer under a disparate treatment and/or disparate impact theory. Fragante's action was brought under the disparate treatment theory.

[1] In disparate treatment cases, the employer is normally alleged to have "treat[ed] a person less favorably than others because of the person's race, color, religion, sex, or national origin. . . ." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). The plaintiff has the initial burden in such a case of providing by a preponderance of the evidence a prima facie case of discrimination. *MacDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[2] To establish a prima facie case of disparate treatment, the plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." *Yartzoff v. Thomas*, 809 F.2d 1371, 1374 (9th Cir. 1987) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253

(1981)). Plaintiffs commonly prove a prima facie case by showing that the four factors set forth in *McDonnell Douglas* are present. To accomplish this a plaintiff, such as Fragante, must show: (1) that he has identifiable national origin; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* "Title VII's nature and purpose require that the *McDonnell Douglas* test be flexible." *Spaulding v. University of Washington*, 740 F.2d 686, 700 (9th Cir.) *cert. denied* 469 U.S. 1036 (1984). The burden of establishing a prima facie case for disparate treatment is not onerous. *Burdine*, 450 U.S. at 253. A determination of whether a plaintiff establishes a prima facie case will depend on the facts of each case. *Id.*

[3] Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by "articulating some legitimate, nondiscriminatory reason" for the adverse action. *Id.* at 254. After the employer presents legitimate reasons for plaintiff's non-selection, the burden shifts to the plaintiff, and he must show – if he can – that the employer's purported reason for non-selection was "a pretext for invidious discrimination". *Id.* at 252-53. To succeed in carrying the ultimate burden of proving intentional discrimination, a plaintiff may establish a pretext either directly, by showing that the employer was more likely motivated by a discriminatory reasons, or indirectly, by showing the employer's proffered reason is unworthy of credence. *Id.* at 256.

A. Prima Facie Case

Defendants first argue Fragante failed to meet his burden of proving a prima facie case because he failed to show he was actually qualified for the SR-8 clerk position, a position which requires the applicant to be able to communicate clearly and effectively. Fragante, on the other hand, contends he was qualified for the position. As proof he points to his exceptional score on the objective written examination, and he argues that his speech, though heavily accented, was deemed comprehensible by two expert witnesses at trial. Fragante's position is supported by the approach taken by the Equal Employment Opportunity Commission which submits that a plaintiff who proves he has been discriminated against solely because of his accent does establish a prima facie case of national origin discrimination. *Bell v. Home Life Insurance Co.*, 596 F.Supp. 1549, 1554-55 (M.D.N.C. 1984); *Carino v. University of Oklahoma*, 25 FEP Cases 1332, 1336-37 (W.D. Okla. 1981), *aff'd*, 750 F.2d 816 (10th Cir. 1984). *See also Berke v. Ohio Dept. of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam) (court upheld determination that discrimination on the basis of foreign accent was a sufficient basis for finding national origin discrimination). This contention is further supported by EEOC guidelines which define discrimination to include "the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1988). Furthermore, Fragante was never advised that he was not qualified for the job: he was only told that he was less-qualified than his competition.

Because we find, however, that Fragante did not carry the ultimate burden of proving national origin discrimination, whether Fragante established a prima facie case of discrimination is not significant, and we assume without deciding the issue that he did.

B. Proof of an Ultimate Case of Discrimination

We turn our discussion to whether defendants articulated a legitimate, nondiscriminatory reason for Fragante's non-selection. We find that they did.

[4] The record conclusively shows that Fragante was not selected because of the deleterious *effect* his Filipino accent had upon his ability to communicate orally, not merely because he had such an accent. This is a crucial distinction. Employers may lawfully base an employment decision upon an individual's accent when – but only when – it interferes materially with job performance. There is nothing improper about an employer making such an honest assessment of a candidate for a job when oral communication skills pertain to a BFOQ. EEOC Compliance Manual (CCH) ¶4035 at 3877-78 (1986); *see also Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978) (Dominican chambermaid properly denied promotion to front desk because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"); *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (plaintiff with a "noticeable" Filipino accent was improperly denied a position as supervisor of a dental laboratory where his accent did not interfere with his ability to perform supervisory tasks);

Berke, 628 F.2d at 981 (employee with "pronounced" Polish accent whose command of English was "well above that of the average adult American" was improperly denied two positions because of her accent). Employers are permitted to base their non-selection on requirements, such as the oral ability to communicate effectively in English, if the requirement is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

The EEOC cautions, however, that denying employment opportunities because of an individual's foreign accent insofar as it creates an inability to communicate well in English may be a "cover" for unlawful discrimination. Thus, the EEOC appropriately provides that it will "carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin." 29 C.F.R. § 1606.6(b)(1). We, likewise, give careful consideration to Fragante's allegation of national origin discrimination.

The defendants advertised for applicants to fill SR-8 vacancies. The job announcement listed the ability to "deal tactfully and effectively with the public" as one of the areas to be tested. In order to qualify this requirement as a BFOQ, defendants must establish that the BFOQ is "reasonably necessary to the normal operation of [their] particular business or operation. . . .," 42 U.S.C. § 2000e-2(e)(1), and that there is a factual basis for believing that the job applicant would be unable to perform the duties of the position involved, or alternatively, that it would be "impossible or impractical" for them to deal with the employee on an individualized basis. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (citing

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969)).

There is no doubt that the oral ability to communicate effectively in English is reasonably necessary to the normal operation of the clerk's office. A clerk must be able to respond to the public's questions in a manner which the public can understand. In this regard, the district court in its Findings of Fact and Conclusions of Law and Order made the following significant observations:

> The job is a difficult one because it involves dealing with a great number of disgruntled members of the public. The clerk must deal with 200-300 people a day, many of whom are angry or complaining and who do not want to hear what the clerk may have to explain concerning their applications or an answer to their questions. It is a high turnover position where people leave quickly because of the high stress involving daily contact with contentious people.

(Clerk's Record 30 at 7).

Thus, this requirement meets the statutory standards of being "reasonably necessary to the normal operation of that particular business or enterprise" 42 U.S.C. § 2000e-2(e)(1).

What must next be determined is whether defendants established a factual basis for believing that Fragante would be unable to perform this requirement. Defendants submit that because the accent made Fragante difficult to understand as determined by the interview, Fragante could not meet this bona fide occupational requirement.

Fragante, on the other hand, contends he is able to communicate effectively in English as established by two expert witnesses at trial and by his responses at trial. In essence, he argues his non-selection was based upon national origin discrimination.

After the interview, Kuwahara and McCandless scored Fragante on an interview rating sheet that was used for all applicants. Applicants were scored in the categories of appearance, speech, self-confidence, emotional control, alertness, initiative, personality, attitude, work experience, and overall fitness for the job. A scale of 1-10 was used. Kuwahara gave Fragante a score of 3 for speech, and noted: "very pronounced accent, difficult to understand." Although McCandless did not enter a score in the speech category, she noted: "Heavy Filipino accent. Would be difficult to understand over the telephone."

After the interviews were scored, Kuwahara and McCandless reviewed the scores, discussed the applicants, and decided on their hiring recommendation to finance director Peter Leong. In making the recommendation, written examination scores were given no consideration. Kuwahara made the written recommendation to Leong, dated April 13, 1982, recommending two others for selection. Fragante in his position as Number 3 on the final list was described as follows:

> 3. Manuel Fragante – Retired Phillippine (sic) army officer. Speaks with very pronounced accent which is difficult to understand. He has 37 years of experience in management administration and appears more qualified for professional rather than clerical work. However, because of his accent, I would not recommend him for this position.

(P. Ex. A at 9; P. Ex. N).

McCandless notified Fragante that he was not selected for either of the clerk position vacancies. Pursuant to a request from Fragante, Kuwahara then reduced the matter to writing. In a letter, dated June 28, 1982, the reasons why he was not selected were articulated as follows:

> As to the reason for your non-selection, we felt the two selected applicants were both superior in their verbal communication ability. As we indicated in your interview, our clerks are constantly dealing with the public and the ability to speak clearly is one of the most important skills required for the position. Therefore, while we were impressed with your educational and employment history, we felt the applicants selected would be better able to work in our office because of their communication skills.

(P. Ex. A at 10; P. Ex. Q).

Thus, the interviewers' record discloses Fragante's third place ranking was based on his "pronounced accent which is difficult to understand." Indeed, Fragante can point to no facts which indicate that his ranking was based on factors other than his inability to communicate effectively with the public. This view was shared by the district court.

Although the district court determined that the interview lacked some formality as to standards, instructions, guidelines, or criteria for its conduct and that the rating sheet was inadequate, the court also found that these "insufficiencies" were irrelevant with respect to plaintiff's complaint of unlawful discrimination. A review of the record reveals nothing that would impeach this assessment. Kuwahara and McCandless indicated their

evaluation of Fragante's problems by recording separate remarks as to Fragante's ability to communicate on their rating sheets. As such, a legitimate factual basis for this conclusion that Fragante would be less able than his competition to perform the required duties was established.

Fragante argues the district court erred in considering "listener prejudice" as justifying application of the BFOQ exception. We find, however, that the district court did not determine defendants refused to hire Fragante on the basis that some listeners would "turn off" a Filipino accent. The district court after trial noted that: "Fragante, in fact, has a difficult manner of pronunciation and the Court further finds as a fact from his general testimony that he would often not respond directly to the questions as propounded. He maintains much of his military bearing."

We do not find the court's conclusion clearly erroneous. In *Fernandez v. Wynn Oil.*, 653 F.2d 1273, 1275 (9th Cir. 1982), this court held inability to communicate effectively to be one valid ground for finding a job applicant not qualified.

Having established that defendants articulated a legitimate reason for Fragante's non-selection, our next inquiry is whether the reason was a mere pretext for discrimination. Fragante essentially argues that defendant's selection and evaluation procedures were so deficient as to render the proffered reason for non-selection nothing more than a pretext for national origin discrimination. The problem with this argument, however, is that on examination it amounts only to a characterization

without substance. The process may not have been perfect, but it reveals no discriminatory motive or intent. Instead, it appears that defendants were motivated exclusively by reasonable business necessity. Under our holding in *Ward v. Westland Plasters, Inc.*, 651 F.2d 1266, 1269 (9th Cir. 1980), "[a]n employer's decision may be justified by the hired employee's superior qualifications unless the purported justification is a pretext for invidious discrimination." *Fernandez*, 653 F.2d at 1276. In this case, there is simply no proof whatsoever of pretext, and we do not find the district courts finding of "no discrimination" to be clearly erroneous.

The district court is

AFFIRMED

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MANUEL T. FRAGANTE, Plaintiff, vs. CITY AND COUNTY OF HONOLULU, et al., Defendants.	NO. CIV 83-1129 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER (Filed Oct. 6, 1987)

BACKGROUND

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e-2 and 2000e-5.

The Plaintiff alleges that Defendants discriminated against him by disparate treatment on the basis of national origin, accent, and race when they denied him employment. The Defendants defend on failure to state a claim and denial of unlawful discrimination.

FINDINGS OF FACT

The Plaintiff, Manuel T. Fragante, is a United States citizen of Philippines national origin. He was born September 27, 1921 in Manila. He was well educated, with honors, in the Philippines. He served as a career officer for 30 years in the Philippines Armed Forces retiring while holding the position of Army Adjutant. Most of Mr.

Fragante's schooling, both civilian and military, was conducted primarily in English. After retirement he had subsequent work experience of a supervisorial and administrative nature in Manila, Philippines.

In April, 1981 he and his wife immigrated to the United States where he was naturalized as a citizen in Honolulu, Hawaii in January, 1983, during which period he worked for the Honolulu Community Action Program.

The Defendant City and County of Honolulu is a municipal corporation within the State of Hawaii. Defendants George Kuwahara, Dennis Kamimura, Peter Leong, Kalani McCandless and Eileen Anderson were employed by the City in their respective positions of Assistant Licensing Administrator, Licensing Administrator, Director of the Department of Finance, Secretary to the Licensing Administrator; and Mayor. Presently Peter Leong and Eileen Anderson are no longer employed by the City and Kalani McCandless is deceased.

On November 2, 1981 the City placed an advertisement in the daily newspapers for an employment opportunity as a Clerk SR-8. On November 10, 1981 Plaintiff submitted his application for the advertised position. On December 19, 1981 he took the Civil Service written examination number 043812. He received a grade of 96 and was ranked number 1 on the list of eligibles 721 applicants took the exam, 371 passed and 350 failed.

Mr. Fragante was one of fifteen applicants certified to the Department of Finance, Motor Vehicles and Licensing Division in response to a request for eligibles dated March 22, 1982 to fill two Clerk SR-8 vacancies. Of those certified Plaintiff was ranked number 1.

The employment announcement posted for the SR-8 position concerning the eligible list and referral stated:

> The names of the "top five" qualified applicants with the highest examination grades will be referred to the employing agency in the order of their examination grade and availability for employment according to Civil Service Rules. The employing agency may select any one of the eligibles referred. Those not selected will remain on the list for at least one year for future referrals.

Rule 4.2d of the Civil Service Rules provides, in pertinent part, "an appointment from such certified lists of eligibles may be made without regard to rank order."

Thus, Civil Service certified fifteen applicants for the two positions. The fifteen included the five highest scores including tied scores, transfer, and reemployment applicants who also qualified. Four, including Fragante, chose to be interviewed and five had been interviewed previously. All nine were considered minimally qualified.

On April 6, 1982, Plaintiff reported to the Division of Motor Vehicles and Licensing for a scheduled interview. The interview was conducted by George Kuwahara and Kalani McCandless. Normally, the administrator would participate as a third member of the interview panel, but that did not occur in these interviews.

Kuwahara, a college graduate, regularly conducted interviews for vacancies in the Division and was involved in 50-100 interviews during the three years he was assistant licensing administrator.

Kalani McCandless was the division secretary. She worked under Kuwahara, the number two person in the

Division, but as described by the Administrator, Dennis Kamimura, she was "really the office manager rather than a secretary." She had served in almost all of the positions in the Motor Vehicle Division, was a good interviewer and had vast experience as an interviewer and as an employee in the Motor Vehicle Division, having preceded both Kuwahara and Kamimuri in the Division.

The April 6 interview took approximately 10-15 minutes. The interview was informal. There were no written interview questions but it was standard as compared to other interviews then and on previous vacancies. Although *standard*, the interview lacked formality as to standards, instructions, guidelines, or criteria for its conduct. There was no validation of questions and the interviewers were not formally trained in the process.

After the interview, on the same day, Kuwahara and McCandless scored Plaintiff on an interview rating sheet. The rating sheet was inadequate. Ratings categories were vague, qualitative in nature though reduced to qualitative terms, non-correlative, and not clearly job related nor well defined. Dr. James Kirkpatrick, an Industrial Psychologist, termed it seriously flawed. He testified that written tests are acceptable and reliable. But that the interview and the rating system were entirely subjective and did not meet federal or any acceptable standards of collective decision making. He did not have any familiarity with the activities of the license bureau and never talked to Fragante.

After all those certified had been interviewed, including Plaintiff, Kuwahara and McCandless reviewed the scores which in reference to Plaintiff had noted "Very

pronounced accent, difficult to understand," "Major drawback, difficult to understand. Would have problem working on counter and answering phone. Otherwise, a good candidate," and "Heavy Filipino accent. Would be difficult to understand over telephone." They discussed the applicants in relation to the job demands and decided by consensus on their recommendations to the Finance Director, Peter Leong.

In a written recommendation dated April 13, 1982, Kuwahara requested that Melvin Abe and Morris Miyagi be selected for the vacancies, and ranked Plaintiff third among the four applicants interviewed. He was described as follows:

> 3. Manuel Fragante – Retired Phillipine (sic) army officer speaks with very pronounced accent which is difficult to understand. He has 37 years of experience in management and administration and appears more qualified for professional rather than clerical work. However, because of his accent, I would not recommend him for this position.

In a letter dated June 7, 1982, McCandless notified Plaintiff that he was not selected for the clerk position vacancies.

For a subsequent vacancy Kuwahara recommended in a memo dated June 25, 1982 that Nora Jean Jose be selected as a clerk. Fragante was not selected because of his accent.

In a letter dated June 28, 1982, Kuwahara informed Plaintiff of the reason for non-selection:

> As to the reason for your non-selection, we felt the two selected applicants were both superior

> in their verbal communication ability. As we indicated in your interview, our clerks were constantly dealing with the public and the ability to speak clearly is one of the most important skills required for the position. Therefore, while we were impressed with your educational and employment history, we felt the applicants selected would be better able to work in our office because of their communication skills.

At the time of the Plaintiff's interview, there was no routine review, evaluation or validation of interview procedures or rating systems by employment or labor relation specialists in the Department of Civil Service.

The duties and responsibilities of the Clerk SR-8 position, as described in Form DF-141, involved: (1) answering the telephone; (2) providing motor vehicle registration information to the public at the counter and as requested by the general public and financial institutions, motor vehicle dealers, either by phone or mail; and, (3) acting as field cashier in accepting motor vehicle renewals and dog and bicycle licenses during renewal periods. There were other duties and responsibilities, but all clerks were rotated to perform the full job descriptions and almost all of the duties involved contact with the public.

The job is a difficult one because it involves dealing with a great number of disgruntled members of the public. The clerk must deal with 200-500 people per day, many of whom are angry or complaining and who do not want to hear what the clerk may have to explain concerning their applications or in answer to their questions. It is a high turnover position where people leave quickly because of the high stress involving daily contact with

contentious people. The position is the lowest paid in the city.

Fragante was bypassed because of his "accent." As explained by Dr. Michael Forman, a PhD and an associate professor of socio and ethnic linguistics specializing in Filipino interactions with anglos, there is a misunderstanding as to what an accent is. Everyone has an accent. It is merely a manner of pronunciation, often linked to national origin.

While Plaintiff has extensive verbal communication skill in English it is understandable why the interviewers might reach their conclusion. And while there is no necessary relationship between accent and verbal communication, as opined by Dr. Forman, listeners stop listening to Filipino accents, resulting in a breakdown of communication. Hawaii is a socially and linguistically complex community.

Fragante, in fact, has a difficult manner of pronunciation and the Court further finds as a fact from his general testimony that he would often not respond directly to the questions as propounded. He maintains much of his military bearing.

After receiving notice of the reason for his non-selection, Mr. Fragante filed a charge of discrimination dated September 2, 1982 and amended January 19, 1983. Harry Fujimori, a Fair Employment Practices Specialist, investigated the complaint of race, national origin and age discrimination and determined that the respondents/defendants did not discriminate against the plaintiff and issued a right to sue letter from the EEOC. This complaint followed on October 27, 1983.

CONCLUSIONS OF LAW

The Court has jurisdiction over the parties and subject matter of this action by virtue of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq*. The Defendant City and County of Honolulu is an employer within the meaning of Title VII of the Civil Rights Act of 1964.

The rejection by the City of Plaintiff's application for the position of Clerk SR-8 was not based upon any discrimination against Plaintiff because of his race or national origin. It was based on a reasonable policy that is related to the position of Clerk SR-8 and therefore constitutes a business necessity.

The requirement of being able to communicate clearly and effectively with an often contentious general public is a bona fide occupational qualification which is necessary to the City's business of providing services and assistance to the general public concerning motor vehicles and licensing matters.

The results of Plaintiff's interview show that his oral communication skills were hampered by his accent or manner of speaking, and pronouncing, which made it difficult for the City interviewers to understand his answers and statements during the course of the interview.

In spite of the insufficiencies of the rating system and the weaknesses of the interview process, as applied to the Plaintiff, they were not discriminating. Nor did the interviewers utilize them in anyway to discriminate against the Plaintiff.

The two applicants, who were selected, satisfied the City's bona fide occupational requirement and therefore were better qualified than Plaintiff for the position of Clerk SR-8.

The City Civil Service Rule 4.2d allowed the Motor Vehicle and Licensing Division of the Department of Finance to select any one of the top five eligibles, among whom was Plaintiff, without regard to his number one ranking.

Plaintiff's non-selection was not disparate treatment and did not violate Title VII of the Civil Rights Act of 1964 because he failed to show that his non-selection was based on any discriminatory intent or motive by the City.

Plaintiff's non-selection did not violate 42 U.S.C. Sec. 1981 because he has failed to establish any proof of a discriminatory intent or motive by the City.

Plaintiff's non-selection did not violate his rights under the Fifth and Fourteenth Amendments of the United States Constitution because he has failed to establish any proof of a discriminatory intent or motive by the City.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is the decision of this Court that Plaintiff's complaint be and it is hereby ordered dismissed.

Dated this 29 day of September, 1987.

/s/ Paul G. Rosenblatt,
Judge, U.S. District Court

APPENDIX E

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX F

29 CFR Ch. XIV (7-1-89 Edition)

Equal Employment Opportunity Comm.

PART 1606 – GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec.

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

SOURCE: 45 FR 85635, Dec. 29, 1980, unless otherwise noted.

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's

name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2921

Manuel Fragante,

Plaintiff-Appellant

v.

CITY AND COUNTY OF HONOLULU,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF HAWAII

Honorable Paul G. Rosenblatt

BRIEF AMICUS CURIAE OF THE MEXICAN
AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

ANTONIA HERNANDEZ
E. RICHARD LARSON
JOSE ROBERTO JUAREZ, JR.
MEXICAN-AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512

Counsel for Amicus Curiae

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INTEREST OF AMICUS

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States, through litigation and education. MALDEF's attorneys have represented Hispanics in federal appellate and district courts in numerous employment discrimination cases.

An accent has always been one of the indicia of Hispanic national origin in American society.[1] Discrimination in employment because of an applicant's or employee's accent is thus a problem which severely impacts the Hispanic community in the United States. This impact falls particularly heavily on two different groups of Hispanics: native-born Hispanics who attended segregated or inferior schools, and immigrants who have learned to speak English as adults.

Although most Hispanics are native-born citizens of the United States, the fact that their native language was Spanish, rather than English, resulted in discrimination against them on the basis of their language.[2] For Mexican

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[1] M. del Valle, *The National Origin Paradigm: The Processes and Consequences of Labor Market Discrimination Sanctioned by Law Against Hispanics* 422 (1987) (available through Inter-University Program for Latino Research/Social Science Research Council) (hereinafter "del Valle").

[2] del Valle at 61 n.105; C. Wallenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975*, at 108-118 (1978); M. Garcia, *Desert Immigrants: The Mexicans of El*

(Continued on following page)

Americans, "language has always been a substitute for national origin/race discrimination."[3] "Mexican schools" were created in the Southwest and sponsored as segregated institutions by public school authorities.[4] Even where Mexican Americans were not segregated, they often resided in school districts which were not provided adequate resources. *See, e.g., San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1 (1973) (upholding validity of school finance system of Texas which provided minimal resources to school district whose student population was 90% Mexican American). As a result of this history of discrimination, many native-born Hispanics retain a recognizable "accent" different from the accent of non-Hispanic citizens born and raised in the same geographic area.[5] The concentration of Mexican Americans in certain

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Paso, 1880-1920, at 110-126; M. del Valle, *Language Rights & Due Process – Hispanics in the United States*, 17 Revista Juridica de la Universidad Interamericana de Puerto Rico 91 (1982); P. Cafferty & W. McCready, *Hispanics in the United States* 87-11 (1985).

[3] del Valle at 414.

[4] *Mendez v. Westminister School District*, 161 F.2d 774 (9th Cir. 1947) (Mexican children segregated on the basis of language without a bona fide basis); *Gonzalez v. Sheeley*, 96 F.Supp. 1004 (D. Ariz. 1951) (same); *Soria v. Oxnard Sch. Dist. Bd. of Trustees*, 386 F.Supp. 539 (C. D. Cal. 1974) (Mexican children segregated by schools and classrooms for more than 40 years); *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975) (Mexican school founded as early as 1907 as a result of the "language problem"); *Alvarado v. El Paso ISD*, 426 F. Supp. 575 (1976), *aff'd*, 593 F.2d 277 (5th Cir. 1979) (Mexican School founded in 1887, Mexican District in 1922).

[5] The legacy of the denial of equal educational opportunities has been recognized by the United States Congress:

(Continued on following page)

geographic areas also has contributed to the retention of a recognizable accent by many.[6]

The second group of Hispanics affected by accent discrimination is composed of immigrants to the United States who have learned to speak English as adults. As is true of most immigrants who came to the United States as adults from non-English speaking countries, Hispanic immigrants usually speak English with a pronounced accent.[7] Although an immigrant who learns English as an adult often learns to read, write and speak English, he rarely learns to speak English with any of the accents commonly recognized as "American". "Although not as permanent as race or color, an accent is not easily changed for a person who was born and lived in a foreign country for a good length of time." *Carino v. Univ. of Oklahoma*, 25 Fair Empl. Prac. Cas. (BNA) 1332, 1337 (W.D. Okla. 1981), *aff'd*, 750 F.2d 815 (10th Cir. 1984).

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> The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope . . . [T]hey have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language.

42 U.S.C. §1973(b)(f)(1).

[6] *Cf.* Comment, *Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151, 1161 n.68 (noting Acadians living in geographic concentrations in Louisiana often speak with an Acadian accent with a well-defined French influence).

[7] Note, *"Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345, 1354 (1987) ("For adults in particular . . . learning a new language may be extremely difficult or impossible.").

Although there is no data available on the numbers of persons who speak English with an accent, the number can be approximated through available data on the number of persons who speak a language other than English in their homes. Of the 23,060,040 persons who spoke a language other than English in their home in 1980, 11,116,194 (48%) spoke Spanish. Spanish-speakers numbered 8,352,508 (44%) of the 18,836,544 persons who spoke another language at home but who also spoke English well or very well.[8] Although many of these bilingual persons speak English with one of the standard "American" accents, many do not. Clearly the problem of discrimination on the basis of accent, if not redressed by the federal courts, is one that can affect large numbers of Hispanics.

Hispanic immigrants, like other immigrants, tend to adopt English, and by the third or fourth generation use English almost exclusively.[9] Nevertheless, the impact of discrimination on the basis of accent, if left immune from attack under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, will only increase. The United States Bureau of Census recently projected that the Hispanic population nationwide will double to 12% by the year

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[8] U.S. Bureau of the Census, 1980 Census of Population, General Social & Economic Characteristics, Document PC80-1C1, at 1-68 (1983).

[9] K. Karst, *Paths to Belonging: The Constitution & Cultural Identity*, 64 N. C. L. Rev. 303, 352 (1986) (hereinafter "Karst") (citing Grenier, *Shifts to English as Usual Language by Americans of Spanish Mother Tongue*, in The Mexican American Experience: An Interdisciplinary Anthology (1985)).

2020. In addition, Hispanics are expected to comprise more than one-third of the prime working age population by 2030. A study commissioned by the United States Department of Labor estimates immigrants will comprise the second largest segment of new entrants into the labor market by the year 2000.[10] Hispanics and Asians have comprised 78% of the immigrants who have entered the country since 1970. "In short, by the end of the century, the United States will be a multi-ethnic nation the like of which even we have never imagined."[11] Obviously, large numbers of workers in the future will continue to speak English with an accent other than one of those ordinarily considered to be "American." The federal courts must insure that these workers continue to be protected against discrimination.

Amicus believes that discrimination on the basis of accent discriminates on the basis of national origin and thus violates Title VII. Amicus is interested in this issue because it represents Hispanics who suffer such discrimination in the workplace. Amicus has substantial expertise in litigating national original employment discrimination cases, and believes that its expertise may be of assistance to the Court.

STATEMENT OF THE CASE

This case involves the issue of whether an employer's refusal to hire an applicant solely because of his accent, a characteristic related to his national origin,

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[10] W. Johnston, *Workforce 2000* (1987).

[11] Senator Daniel Patrick Moynihan *quoted in* Karst at 304

constitutes discrimination on the basis of national origin in violation of Title VII. Amicus adopts the statement of facts in Appellant's brief.

Contrary to the finding of the District Court, an employer's refusal to hire because of an applicant's accent is discrimination based on national origin, in violation of Title VII.

I. ACCENT DISCRIMINATION RATIONALIZES SUBORDINATION OF THOSE WHO DO NOT SHARE AN "AMERICAN" CULTURE IDENTITY.

All persons who speak English speak with an accent.[12]

An accent establishes the speaker's membership in a cultural group:

> *To grow up in a culture is to learn that some ways . . . of talking . . . are right and other ways are wrong.* The very sense of one's identity is connected intimately with this learning . . . Outsiders – those who belong to other groups with other ways of behaving – make us uncomfortable partly because our own acculturation has not prepared us to understand their behavior and partly because they serve so handily as screens on which we can project our own negative identities. Our psychic response is predictable: we want to repress the outsiders' incorrect, foreign ways . . . Language differences provide both a way to rationalize subordination and a ready means for accomplishing it.

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[12] 2 Transcript of Proceedings at 254. (Testimony of Dr. Michael Forman)

Karst at 351-52 (emphasis supplied) (footnotes omitted).[13] *See Loiseau v. Dept. of Human Resources*, 567 F. Supp. 1211, 1219 (D. Or. 1983) (West Indian speech generates negative reactions and even hostility). Such fears can result in the harassment of employees who are not members of the majority culture. *Snell v. Suffolk County*, 611 F. Supp. 521, 532 (E.D.N.Y. 1985); *aff'd*, 782 F.2d 1094 (2d Cir. 1986) (court prohibits mimicking of Hispanic and Black employees because of what some employees may believe to be stereotypical characteristics of minorities).

Only when an employer has shown that an individual's accent is so incomprehensible as to render the individual unqualified for a particular position should the federal courts permit discrimination on the basis of accent. Without such a showing, the courts risk permitting fears and prejudices to justify a classification based on national origin, contrary to the stated purpose of title VII. *Gutierrez*, ___ F.2d at ___, 88 Daily Journal D.A.R. at 1043 (existing fears or prejudices cannot justify classification on basis of national origin, nor constitute the business necessity for an employer's practice burdening a protected class); *Id.* at ___, 88 Daily Journal D.A.R. at 1045 (public relations concerns do not constitute a business necessity).

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[13] Cf. McArthur, *Worried About Something Else*, 60 Int'l J. Soc. Language 91 (1986) ("[I]t can help to make fears [of non-Anglos] tidy and manageable if one talks in an apparently rational manner about ... safeguarding the nation's language" (cited in *Gutierrez v. Municipal Court*, ___ F.2d ___, ___, 88 Daily Journal D.A.R. 1039, 1042 (9th Cir. 1988)).

II. DISCRIMINATION ON THE BASIS OF ACCENT IS NATIONAL ORIGIN DISCRIMINATION PROHIBITED BY TITLE VII OF THE 1964 CIVIL RIGHTS ACT.

A. This Court's decisions establish that language-based discrimination constitutes prohibited national origin discrimination

In *Gutierrez*, a panel of this court recently held that a rule prohibiting employees from speaking any language other than English discriminated against a Hispanic employee on the basis of her national origin, in violation of Title VII. ___ F.2d at ___, 88 Daily Journal D.A.R. at 1044. The *Gutierrez* panel noted that "language is an important aspect of national origin," *Id.* at ___, 88 Daily Journal D.A.R. at 1041 and noted further that "[b]ecause language and accents are identifying characteristics, rules which have a negative effect on . . . individuals with accents . . . may be mere pretexts for intentional national origin discrimination." *Id.* at ___, 88 Daily Journal D.A.R at 1042.

In establishing a relationship between language-based discrimination and national origin discrimination, the panel in *Gutierrez* relied in part on the analysis in *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (en banc), *vacated as moot*, ___ U.S. ___, 56 U.S.L.W. 3241 (Oct. 6, 1987).[14] In *Olagues* this Court reversed a district court's dismissal of an action brought challenging an investigation by the United States Attorney into alleged voter

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[14] The *Gutierrez* panel agreed with the analysis in the vacated en banc opinion, but did not rely on it as precedent. ___ F.2d at ___ n. 5, 88 Daily Journal D.A.R. at 1049 n.5.

fraud by foreign-born voters requesting bilingual ballots. This Court specifically found that "an individual's primary language skill generally flows from his or her national origin," *Id.* at 1520, and noted "the history of discriminatory treatment inflicted on Chinese and Hispanic people." *Id* at 1521. In *Hung Ping Wang v. Hoffman,* 694 F.2d 1146 (9th Cir. 1982) an employer defended its failure to promote an Asian employee on the ground he did not possess the requisite language skills. This Court reversed the District Court's dismissal of the action, noting that "a language skills requirement seems on its face to have a disparate impact on minority applicants." *Id.* at 1149. Thus in *Hung Ping Wang, Olagues,* and *Gutierrez* this Court has recognized the correlation between language discrimination and national origin/race discrimination.

In both *Olagues* and in *Gutierrez,* a case involving accent discrimination was cited in support of the finding that language based discrimination constitutes national origin discrimination.[15] This Court should adopt the reasoning of its prior holding in *Gutierrez* and reverse the District Court's determination that accent discrimination does not constitute national origin discrimination.

B. This Court should follow the reasoning of other courts which hold discrimination on the basis of accent to constitute national origin discrimination.

Appellant Fragante is similar in many ways to the plaintiff in *Berke v. Ohio Department of Public Welfare,* 30

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[15] *Berke v. Ohio Dept. of Public Welfare,* 628 F.2d 980 (6th Cir. 1980) (per curiam). See *infra.*

Fair Empl. Prac. Cas. (BNA) 387 (S.D.Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (per curiam). As in the case of Rozalia Berke, a Polish immigrant,

> There is ample evidence that persons referred to [Fragante's] accent. [He] speaks with a pronounced accent, but . . . can be readily understood. [His] command of the language is well above that of the average adult American. Moreover, there is no evidence that the accent has negatively affected [his] job performance.

Id. at 391. Finding that Ms. Berke's accent made it reasonable to assume she had a national origin other than that of the United States, the district court concluded that she had been discriminated against on the basis of her national origin:

> [P]laintiff's qualifications for these positions were such that she should not have been rejected because of her accent. Her accent, I conclude, did not amount to a substantial impediment to her performance of either job. An accent-free manner of speaking may be necessary for a media broadcaster, but not for either ODPW position.

Id. at 393. In affirming the district court, the Sixth Circuit noted that the "record fully supports the finding of the district court that the plaintiff was denied two positions within the Department because of *her accent which flowed from her national origin*." 628 F.2d at 981 (emphasis supplied).

As in the case of Appellant Fragante, the plaintiff in *Carino v. University of Oklahoma* had a "noticeable accent resulting from his national origin," the Republic of the Phillipines. 25 Fair Empl. Prac. Cas. (BNA) at 1333. Noting that the plaintiff's accent did not prevent him from

performing his job, the district court found this allegation "to be either a convenient excuse or the result of an innacurate presumption . . . " *Id.* at 1337. The district court went on to hold that the accent discrimination against Carino discriminated against him on the basis of his national origin, in violation of Title VII.[16] In affirming the district court, the Tenth Circuit enunciated the standard to be used in determining whether discrimination on the basis of accent violates Title VII:

> A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions.

750 F.2d at 819.[17]

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[16] The district court in Carino based its holding in part on the immutability of an accent, citing the Fifth Circuit's decision in *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *Id.* at 1337. Contrary to this Court's holding in *Gutierrez*, the Fifth Circuit in *Garcia* held that an English-only rule in the workplace does not violate Title VII for bilingual employees. The Fifth Circuit noted, however, that "to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic . . . ." 618 F.2d at 270. This Court rejected any requirement of immutability in *Gutierrez*. ___ F.2d. at ___ n. 12, 88 Daily Journal D.A.R. at 1050 n. 12.

[17] *See also Loiseau*, 567 F. Supp. at 1220 (employer violated Title VII by denying a West Indian Promotion because of his accent); *Bell v. Home Life Ins. Co., 596 F. Supp 1549, 1555 (M.D.N.C. 1984) (prima facie case of national origin discrimination would be established if plaintiff could prove he had been discriminated against because of his New Zealand accent; plaintiff, however,*

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The focus is thus on whether a particular employee meets the requirements for a specific position.[18] Teachers,

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failed to prove discrimination); Mandhare v. W.S. La Fargue Elementary School, 605 F. Supp. 238, 241 (E.D. La. 1985) (plaintiff of Asian (India) origin discriminated against when she was terminated because of communication problems caused by her accent where position did not require such communication), *rev'd,* 788 F.2d 1563 (5th Cir. 1986) (without published opinion); EEOC Decision No. AL 68-1-155E, 1 Fair Empl. Prac. Cas. (BNA) 921 (May 19, 1969) (reasonable cause to believe that employer violated Title VII by refusing to hire Hispanic as retail store manager on basis of his accent); *Cf. Casas v. First American Bank,* 31 Fair Empl. Prac. Cas. (BNA) 1479 (D.D.C. 1983) (employer did not discriminate against employee of Filipino origin where she was not promoted for a variety of reasons, including problematic communication skills unrelated to her accent or other characteristic of her national origin).

[18] Mr. Fragante's performance on the written examination, as well as his educational background (all of his education was in English-language schools), demonstrate his general proficiency in the English language. Thus this case is readily distinguishable from other cases in which an applicant was properly denied a position because of a lack of basic proficiency in English. *Duong Nhat Tran v. City of Houston,* 35 Fair Empl. Prac. Cas. (BNA) 471 (S.D. Tex. 1983) (Vietnamese immigrant was not discriminatorily denied promotion to Inspector III where job was to educate and explain, and plaintiff is sometimes not understood at all); *Vasquez v. McAllen Bag & Supply Co.,* 660 F.2d 686 (5th Cir. 1981), *cert. denied,* 458 U.S. 1122 (1982) (policy of hiring only English-speaking truck drivers did not intentionally discriminate against Mexican American in violation of 42 U.S.C. §1981); *Mejia v. N.Y. Sheraton Hotel;* 459 F. Supp. 375 (S.D.N.Y. 1978) (failure to promote chambermaid from Dominican Republic to front office position did not violate Title VII where plaintiff spoke little English and English language skill was significantly related to successful job performance), *aff'd.*

(Continued on following page)

for example, must be able to communicate the content of a discipline in order to teach effectively. A teacher may therefore be denied a promotion or tenure if his accent makes him an ineffective teacher.[19] Appellee in this case has failed to produce any evidence that Appellant Fragante's accent rendered him unqualified for the position of Clerk SR-8. Rather, as in *Berke & Carino*, Appellee has simply assumed, without any basis for the assumption, that Appellant Fragante could not perform the duties of a Clerk SR-8. Such an assumption cannot serve as a "non-discriminatory reason" for failing to hire Fragante under the disparate treatment model,[20] nor as a business necessity under the disparate impact model.[21] Since Appellee has failed to identify any other non-discriminatory reason

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___ F.2d ___ (2d Cir. 1979), *on remand*, 476 F. Supp. 1068 (S.D.N.Y. 1979).

[19] *Hou v. Pennsylvania*, 573 F. Supp. 1539 (W.D.Pa. 1983) (college did not discriminate when it failed to promote professor of Chinese origin where plaintiff's accent rendered him an "average" teacher and promotions were given only to those with "excellent" teaching effectiveness); *Kureshy v. City University of New York*, 561 F. Supp. 1098. (E.D.N.Y. 1983) (dark-skinned Muslim from India who spoke with a heavy accent was not discriminated against when he was denied tenure since his difficulties with spoken English made him less effective as a teacher and he thus did not meet the standard of "exceptional" achievement).

[20] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

[21] *Gutierrez*, ___ F.2d. at ___, 88 Daily Journal D.A.R. at 1043 (business necessity for English-only rule does not exist where there is no probative evidence of the Spanish language being used to conceal the substance of conversation).

for failing to hire Fragante, the district court's order should be reversed and remanded.[22]

C. The Guidelines of the Equal Employment Opportunity Commission support a finding that accent discrimination is prohibited by Title VII.

The Equal Employment Opportunity Commission (EEOC) has promulgated Guidelines on Discrimination Because of National Origin which define national origin discrimination broadly to include "the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. §1606.1 (1987). The Guidelines specifically note that denial of employment opportunities because of an individual's foreign accent may be discriminatory. 29 C.F.R. §1606.6(b)(1). These Guidelines are entitled to considerable deference so long as they are not inconsistent with Congressional intent. *Gutierrez*, ___ F.2d at ___ n. 6, 88 Daily Journal D.A.R. at 1050 n.6.

The EEOC has amplified these Guidelines through a Policy Statement on Discrimination Based on Manner of Speaking or Accent. EEOC Compliance Manual (BNA)

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[22] This is not a case where an accent is only one of several deficiencies considered by the employer. *Cf. Desai v. Tompkins County Trust Co.*, 34 Fair Empl. Prac. Cas. (BNA) 938 (N.D.N.Y. 1984) (native of India was not discriminatorily denied a promotion nor retaliatorily terminated where her communication difficulties were considered in addition to her performance and attitude problems, occasional body odor, abruptness in tone and manner, slowness, and difficulty in cooperating with co-workers).

§623.10 (August 1986). Under the Policy Statement, EEOC focuses on whether the individual's accent has a detrimental effect on actual job performance. If the employer can communicate well enough to perform all the functions required by the job, a violation of Title VII may be established. *Id.* This policy was recently affirmed:

> It is unlawful to discriminate against an individual because of the individual's accent or manner of speaking unless the employer can show a legitimate, nondiscriminatory reason for its action. Where an employer claims that the individual's accent interfered with job performance, the Commission will carefully investigate the kinds of communications required by the job and the individual's ability to engage in those communications successfully.

EEOC Policy Statement: Relationship of Title VII of the Civil Rights Act to the Immigration Reform and Control Act of 1986, Fair Empl. Prac. Cases §401:445-47 (adopted February 26, 1987).

Under the EEOC's Guidelines and Policy Statements, Appellant Fragante clearly established that he was discriminated against on the basis of his national origin.

D. Enactment of the Immigration Reform and Control Act of 1986 shows Congress' understanding that Title VII bans discrimination on the basis of accent.

The Immigration Reform and Control Act of 1986 (IRCA) for the first time penalizes employers who hire workers who are not authorized to work in the United States. 8 U.S.C. §1324a. Congress was aware of concerns

that this would cause discrimination against Hispanics and others who appeared "foreign"

> Numerous witnesses over the past three Congresses have expressed their deep concern . . . that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their *linguistic* or physical characteristics.
>
> Representative Robert Garcia testified that 'as a shorthand for a fair identification process, employers would turn away those who appear "foreign", whether by name, race or *accent*' . . .

H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 68 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5672 (emphasis supplied). Responding to these concerns, Congress included within IRCA provisions broadening Title VII's protection against national origin discrimination by prohibiting national origin discrimination by all employers who employ 4 or more employees.[23]

> The bill broadens the Title VII protections against national origin discrimination, while not broadening the other Title VII protections, because of the concern of some Members that people of "foreign" appearance might be made more vulnerable by the imposition of sanctions. While the bill is not discriminatory, there is some concern that some employers may decide not to hire "foreign" appearing individuals to avoid sanctions.

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[23] Title VII's prohibition against discrimination on the basis of national origin only applies to employers who employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

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H.R. Conf. Rep. No. 1000, 99th Cong. 2d Sess. 87, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5840, 5842. Congress thus clearly understood that Title VII's prohibition against discrimination includes a prohibition against discrimination on the basis of traits, such as an accent, which might lead an employer to suspect that an applicant's national origin is one other than the United States. Significantly, this understanding extended as well to those members of Congress opposing the adoption of the antidiscrimination provisions of IRCA.[24] *See also EEOC Policy Statement, supra,* Fair Empl. Prac. Cas.—(BNA) §401:445 (IRCA "leaves in full force and effect the provisions of Title VII which ban discrimination in employment on account of national origin").

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42 U.S.C. § 2000e. IRCA's prohibition of national origin discrimination covers all employers except those employing 3 or fewer employees, 8 U.S.C. §1324b(a)(2)(A), and those already covered by Title VII, 8 U.S.C., §1324b(a)(2)(B).

[24] *See, e.g.,* H.R. Rep. 682(I), 99th Cong. 2d Sess. 211, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5747 (additional views of Rep. Dan Lungren) (IRCA's anti-discrimination provisions are unnecessary since Title VII's prohibition on national origin discrimination already covers the avoidance by an employer of "anyone who seems foreign"); *Id.* at 110, *reprinted in* 1986 Code Cong. & Admin. News 5714 (letter from Assistant Attorney General John R. Bolton expressing the views of the Department of Justice) ("discrimination on the basis of national origin is already prohibited by existing law and need not be duplicated by this bill as well").

CONCLUSION

Accent discrimination is a continuing problem for Hispanics and other linguistic minorities in the United States. Both sociolinguistic analysis and legal precedent clearly establish the connection between accents and national origin. Discrimination the basis of accent is discrimination on the basis of national origin, and is therefore prohibited by Title VII. Denial of employment to an applicant because he has an accent although the accent does not inhibit his ability to perform the job is proscribed by Title VII's prohibition on national origin discrimination.

The appeal, together with the relief sought by Plaintiff-Appellant, should be granted.

DATED: March 28, 1988

Respectfully submitted:

ANTONIA HERNANDEZ
E. RICHARD LARSON
JOSE ROBERTO JUAREZ, JR.
Mexican American Legal Defense
& Educational Fund

By: /s/Jose Roberto Juarez, Jr.
Jose Roberto Juarez, Jr.
Counsel For Amicus Curiae

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2921

MANUEL FRAGANTE,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF HONOLULU, *et al.*,

Defendants-Appellees.

On Appeal From The United States District Court
for the District of Hawaii

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

SUSAN BUCKINGHAM REILLY
Assistant General Counsel

PEGGY R. MASTROIANNI
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
2401 E Street N.W., Room 224
Washington, DC 20507
(FTS/202) 634-6107

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BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The United States Equal Employment Opportunity Commission is the agency primarily responsible for interpreting and enforcing Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* This case concerns whether a man rejected for a job because of his Filipino accent was the victim of unlawful national origin

discrimination. The lower court failed to address whether the ostensible communication problems that disqualified Fragante resulted from the cultural bias of defendants' interviewers. Its incomplete analysis could permit subtle, actionable job discrimination to go unremedied. We therefore respectfully present our views.

STATEMENT OF ISSUE, REVIEWABILITY AND STANDARD OF REVIEW

The issue is whether an employer discriminates against a job applicant on the basis of national origin, in violation of Title VII, if the bias of the employer's interviewers against the applicant's foreign accent is the cause of his rejection. The district court appears to have answered the question "no." (CR 30 at 7).

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. 1331, 1343(4) and section 706(f)(3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3). This Court has jurisdiction pursuant to 28 U.S.C. 1291, as this is an appeal from a final judgment. Judgment was entered on October 7, 1987, and a timely appeal was filed on October 30, 1987. Rule 4(a)(1), FRAP.

STATEMENT OF THE CASE

Manuel Fragante filed this suit in 1983 under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* He alleged that the City and County of Honolulu unlawfully rejected him for a clerical position

because of his race, color, and national origin. After a bench trial, the district court entered judgment for Honolulu. This appeal followed.

STATEMENT OF FACTS

1. *Evidence*

Manuel Fragante emigrated from the Philippines in 1981 at the age of sixty and became a naturalized United States citizen two years later. (RT 25-27). His education in the Philippines from primary school through college and military training courses was conducted primarily in English. (RT 29, 34, 36). After serving in the Philippine armed forces for thirty years, he spent seven years managing a private sector distribution center in Manila. (RT 41-42).

Upon arriving in Hawaii, Fragante obtained a part-time job doing general office work at the Honolulu Community Action Program. (RT 43). He also applied for the job at issue in this litigation – an entry level Clerk SR-8 job – in response to a newspaper advertisement placed by the City and County of Honolulu. (RT 50). As part of the application process, Fragante took a Clerk SR-8 civil service examination which tested, among other things, word usage, grammar, and spelling. (RT 52-53; PX D at 1). He scored the highest of 721 test-takers. (RT 115; PX A at 2-3; PX E). Accordingly, Fragante was ranked first on a certified list of eligibles for two Clerk SR-8 vacancies in the Honolulu Motor Vehicles Division. (PX A at 3; PX G). The Division's clerical jobs involved such tasks as filing, processing mail, cashiering, providing routine information

over the telephone and at an information counter, and obtaining supplies. (PX J).

Fragante was interviewed by two Division employees, George Kuwahara, the assistant licensing administrator, and Kalani McCandless, the Division secretary. (PX A at 4). Neither employee was given formal standards, instructions, or guidelines for the conduct of the interview. (*Id.* at 5). They asked Fragante primarily yes/no questions, including whether he was willing and able to work overtime, whether he could lift heavy objects, whether he was interested in working with the public, and how long he would stay in the job. (RT 56, 117, 120). Situational questions, designed to show how an applicant would actually deal with the public, were not asked during Fragante's 10 to 15 minute interview. (RT 55, 116, 121).

Kuwahara and McCandless used a rating sheet to score applicants in each of 10 categories, one of which was "Speech." (Px A at 6).[1] The scoring system for speech did not purport to measure fluency, diction, sentence structure, word choice, speech pattern, or any other objective characteristic of speech. (PX A at 7). Instead, it simply rated speech in 10 degrees, describing the lowest extreme as "Inarticulate" and the highest as "Convincing." (PX L).

Because of the negative recommendations of the two interviewers, Fragante was not selected for either of the

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[1] The other categories were appearance, self-confidence, emotional control, alertness, initiative, personality, attitude, work experience, and overall fitness for the job. (*Ibid*).

Division's two openings. (RT 135-36, 157-58; PXs N, Q). Kuwahara rated him a "3" in speech, noting "[v]ery pronounced accent, difficult to understand." (RT 124; PX L). Kuwahara further wrote that Fragante "[w]ould have problems working on counter & answering phones." (PX L at 2). McCandless likewise noted that Fragante has a "[h]eavy Filipino accent" and "[w]ould be difficult to understand over the phone." (PX M at 1).[2]

At trial,[3] Fragante produced Dr. James J. Kirkpatrick, an industrial psychologist (RT 171-79), who testified that defendants' interviewing process did not validly measure job-related abilities because the interview was too short, the interviewers had no training or guidelines, and the rating sheet was illogical and resulted in arbitrary scoring. (RT 182-98). Fragante also presented Dr. Michael

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[2] Fragante later obtained a clerical job with the Hawaii Department of Labor. (RT 44). He was promoted to Research Statistician, a job which he currently holds. (RT 46). Both the clerk and statistician jobs involved substantial use of the telephone. (RT 45, 46).

[3] Prior to trial, Fragante exhausted his administrative remedies. He filed a discrimination charge with the Hawaii Department of Labor and Industrial Relations and with EEOC. (RT 61-62; PXs S, T). The Department's investigator, Harry Fujimoro, determined that the charge was without merit. (RT 335-36).

Without conducting its own investigation (RT 338), and giving "substantial weight to final findings and orders" of the Hawaii Department (§ 706(b) of Title VII, 42 U.S.C. 2000e-5(b)), EEOC likewise issued a "no cause" determination on Fragante's charge. (PX T). We now participate as *amicus* because Fragante's trial evidence, not adduced in the administrative stage, poses an important legal issue.

Forman, associate professor of linguistics at the University of Hawaii (RT 247), whose specialty is the interaction of Philippine languages with Americans, particularly in the Hawaii speech community. (RT 249-50). Forman testified that he found much of the testimony concerning Fragante's accent to be "highly problematic." (RT 254).

He explained that everyone speaks with an accent, which is simply a manner of pronunciation, and thus that "[s]aying someone has an accent is about as informative as saying someone has a nose or a mouth." (*Ibid*). Characterizing a person's accent as "heavy" or "pronounced," Forman stated, is a "cultural statement" (RT 264), a "response that has to do with perceptions of difference in ways of speaking." (RT 266). Because, in Forman's opinion, Fragante was a competent speaker of standard English (RT 256, 267),[4] there was "a problem in understanding why the interviewers said they didn't understand him, or they had difficulty understanding him." (RT 257).

There was no videotape of the interview, or any contemporaneous record of specific difficulties that the

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[4] Forman formed that opinion based upon listening to Fragante's trial testimony and to an earlier tape recording of Fragante's speech. (RT 270-71). Dr. Kirkpatrick also testified that he could clearly understand Fragante's trial testimony (RT 209) and pointed out that, in the course of approximately 60 pages, the court reporter only twice asked Fragante to clarify his statement, once with respect to a proper name. (RT 209). Forman also testified that "it's very unlikely that [Fragante's] accent ha[d] changed much, or at all, in the intervening five years" between 1982, when he was interviewed, and the 1987 trial. (RT 286-87).

interviewers had encountered; for this reason, Forman testified that he could not be sure of what had happened. (RT 257-58).[5] He stated, however, that his indicated that non-Filipino listeners responded to Filipino-accented English by "a turning off, a refusal to continue to listen. . . ." (RT 260). Forman added that Filipinos have reacted similarly to his English-accented speaking of a Philippine language, explaining that many "listeners whose cultural backgrounds have created an attitude about language or . . . about a way of speaking might well do this." (RT 261). "[T]he listener's role in this communication process," Forman emphasized, is "critical." Accordingly, "[w]hen understanding breaks down, or when it's claimed that understanding breaks down," Forman stated, "we must look to both parties to understand the nature of the alleged breakdown." (RT 262). "[W]hat's at issue," Forman concluded, it "[h]ow . . . we react to . . . each other's differences. . . ." (RT 293).

The court found that "Fragante was bypassed because of his 'accent.' " (CR 30 at 7). While noting that Fragante has "extensive verbal communication skill in English," the court nevertheless found it understandable why the interviewers might reach their conclusion. It recognized the opinion of Dr. Forman that "listeners stop listening to Filipino accents, resulting in a breakdown of communications." (*Ibid.*). The court found that "Fragante, in fact, has a difficult manner of pronunciation," that he would often not respond directly to questions at trial, and

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[5] Forman characterized the measurement of speech ability on defendants' interview rating sheet as "very shabby." (RT 263).

that "[h]e maintains much of his military bearing." (*Id.* at 8).

The court found that the interviewing process was weak, the rating sheet inadequate, and the rating categories vague and not clearly job-related. (CR 30 at 4-5, 6). However, it relied on the results of Fragante's interview to find that his oral skills "were hampered by his accent or manner of speaking. . . ." (*Id.* at 9). Concluding that Fragante lacked the "bona fide occupational requirement" of being able to communicate effectively with the public, the court dismissed his claim. (*Id.* at 9-10).

ARGUMENT

IT IS NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII FOR AN EMPLOYER TO REJECT A JOB APPLICANT BECAUSE HIS FOREIGN ACCENT TRIGGERS A BIAS IN THE LISTENER THAT IMPEDES COMMUNICATION

Public hostility or bias against individuals of foreign national origin is not a legitimate reason under Tile VII for rejecting an otherwise qualified applicant. Hostility or bias to a foreign accent, often a component of national origin discrimination must also be closely scrutinized under Title VII. The district court, however, did not appear to recognize this legal principle. Although it acknowledged Dr. Forman's opinion that cultural bias can result in a breakdown of communication, it failed to make any finding as to whether or not the alleged communication problems that barred Fragante's employment resulted from the bias of his non-Filipino interviewers. For this reason, EEOC maintains that the judgment

should be vacated and the case remanded for reconsideration under the correct legal framework.

Whether or not the interviewers were in fact biased is an open question to be resolved below. The lower court should be cautioned on remand to carefully reconsider whether the defendant's decision was based on an *unbiased* assessment of Fragante's communicative skills, so as to fairly decide the difficult but critical question left unanswered here.

1. Title VII prohibits an employer from discriminating against an individual on the basis of his national origin. § 703(a), 42 U.S.C. 2000e-2(a). EEOC guidelines define such discrimination broadly, to include "the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1. The Courts have generally agreed that a plaintiff who proves he has been discriminated against because of his accent establishes a *prima facie* violation of the statute. *Berke v. Ohio Dept. of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980); *Bell v. Home Life Insurance Co.*, 596 F. Supp. 1549, 1554-55 (M.D.N.C. 1984); *Carino v. University of Oklahoma*, ___ F. Supp. ___, 25 FEP Cases 1332, 1336-37 (W.D. Okla. 1981), *aff'd*, 750 F.2d 816 (10th Cir. 1984). As this Court quite recently observed, "[b]ecause . . . accents are identifying characteristics, rules which have a negative effect on . . . individuals with accents . . . may be mere pretexts for intentional national origin discrimination." *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1044-45 (9th Cir. 1988).

At the same time, however, an employer may lawfully base an employment decision upon an individual's

foreign accent where it interferes with job performance. EEOC Compliance Manual (CCH) 4035 at 3877-78 (1986); *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (Dominican chambermaid properly denied promotion to front desk because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"). The language proficiency level asserted by the employer must, however, be related to the specific job in question. *See Carino v. University of Oklahoma Board of Regents*, 750 F.2d at 819 (plaintiff with a "noticeable" Filipino accent was improperly denied a position as supervisor of a dental laboratory where his accent did not interfere with his ability to perform supervisory tasks); *Berke v. Ohio Dept. of Public Welfare*, 628 F.2d at 981 (employee with "pronounced" Polish accent whose command of English was "well above that of the average adult American" was improperly denied two positions because of her accent).

2. In this case, the ability to communicate orally in English was a requirement of the job. We believe, however, that the court failed to assess Fragante's ability under the correct legal standard. The court seemingly credited Dr. Forman's testimony that some persons, because of cultural bias, simply "turn off" when they hear a Filipino accent.[6] By making its finding without

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[6] The courts have recognized that the presence of a foreign accent – even absent any communication difficulty – often inspires hostility. *Hou v. Commonwealth of Pennsylvania*, 573 F. Supp. 1539, 1574 (W.D. Pa. 1983); *Loiseau v. Dept. of Human Resources of the State of Oregon*, 567 F. Supp. 1211, 1219 (D. Ore. 1983).

further comment, however, the court appears to have concluded that the defendants could legitimately reject Fragante even if his alleged communication difficulties resulted from such bias on the part of defendants' interviewers and clientele.

We maintain that this type of xenophobic reaction is no more legitimate than any other type of discriminatory animus. Employer or customer preference for "unaccented" English – just as preference for whites of females – cannot justify a discriminatory practice. *Gerdom v. Continental Airlines*, 692 F.2d 602, 609 (9th Cir. 1982); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-1277 (9th Cir. 1981); *Rucker v. Higher Educational Aids Board*, 699 F.2d 1179, 1181 (7th Cir. 1983) ("It is clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clientele do not like his race."); *Diaz v. Pan American Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *Cf. Hernandez v. Erlenbusch*, 368 F. Supp. 752, 754 (D.D.C. 1973) ("Irritation" of monolingual customers is insufficient justification for imposition of English-only rule on Hispanic patrons of saloon). As one court aptly observed, "[t]he label of 'inability to communicate' may easily be applied to one whose accent is merely unfamiliar." *Panlilio v. Dallas School District*, ___ F. Supp. ___, 25 FEP Cases 1573, 1574 (N.D. Tex. 1979). To ensure that this proffered justification is not simply "act[ing] as a proxy for prohibited discrimination," the courts "must be sensitive to the line drawing between essential communicative skills and familiarity of accents." *Ibid.*

Under this standard, the lower court's analysis is inadequate. As we have noted, the court implied that

Fragante could legitimately be rejected on the basis of the interviewers' or the non-Filipino public's biased reaction to his "different" accent. The court's avoidance of any discussion of the law on customer preference is compounded by its own curious reaction to Fragante. The court's finding that Fragante's accent was "difficult," is belied by the trial transcript where, in 60 pages of testimony by Fragante, the court only once indicates that it cannot understand him. (RT 57). Moreover, the court's gratuitous comment that "he maintains much of his military bearing" (CR 30 at 8), when such bearing was never raised by the employer as a factor in its renection of Fragante suggests that the court itself may have been irritated with Fragante's speech for reasons not necessarily related to his ability to communicate.

In sum, Dr. Forman accurately described this as a case about "[h]ow we react to . . . each other's differences. . . ." (RT 293). The court's ruling below does not foreclose an employer from refusing to hire a man because of its employees' or clientele's consciously or unconsciously biased objection to the "foreign" way he speaks. That ruling must be corrected, for it flies in the face of Title VII's promise of equal employment opportunity for all persons, regardless of our ethnic differences.

CONCLUSION

The judgment should be vacated and the case should be remanded for further factfinding.

Respectfully submitted,

CHARLES A. SHANOR
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

/s/ Susan Buckingham Reilly
SUSAN BUCKINGHAM REILLY
Assistant General Counsel

PEGGY R. MASTROIANNI
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
2401 E Street N.W., Room 224
Washington, DC 20507
(FTS/202) 634-6107

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Statement of Related Cases
(Circuit R. 28-2.6)

Undersigned counsel for EEOC is aware of no related case pending in this Court.

/s/ Susan B. Reilly
SUSAN BUCKINGHAM REILLY
Assistant General Counsel

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